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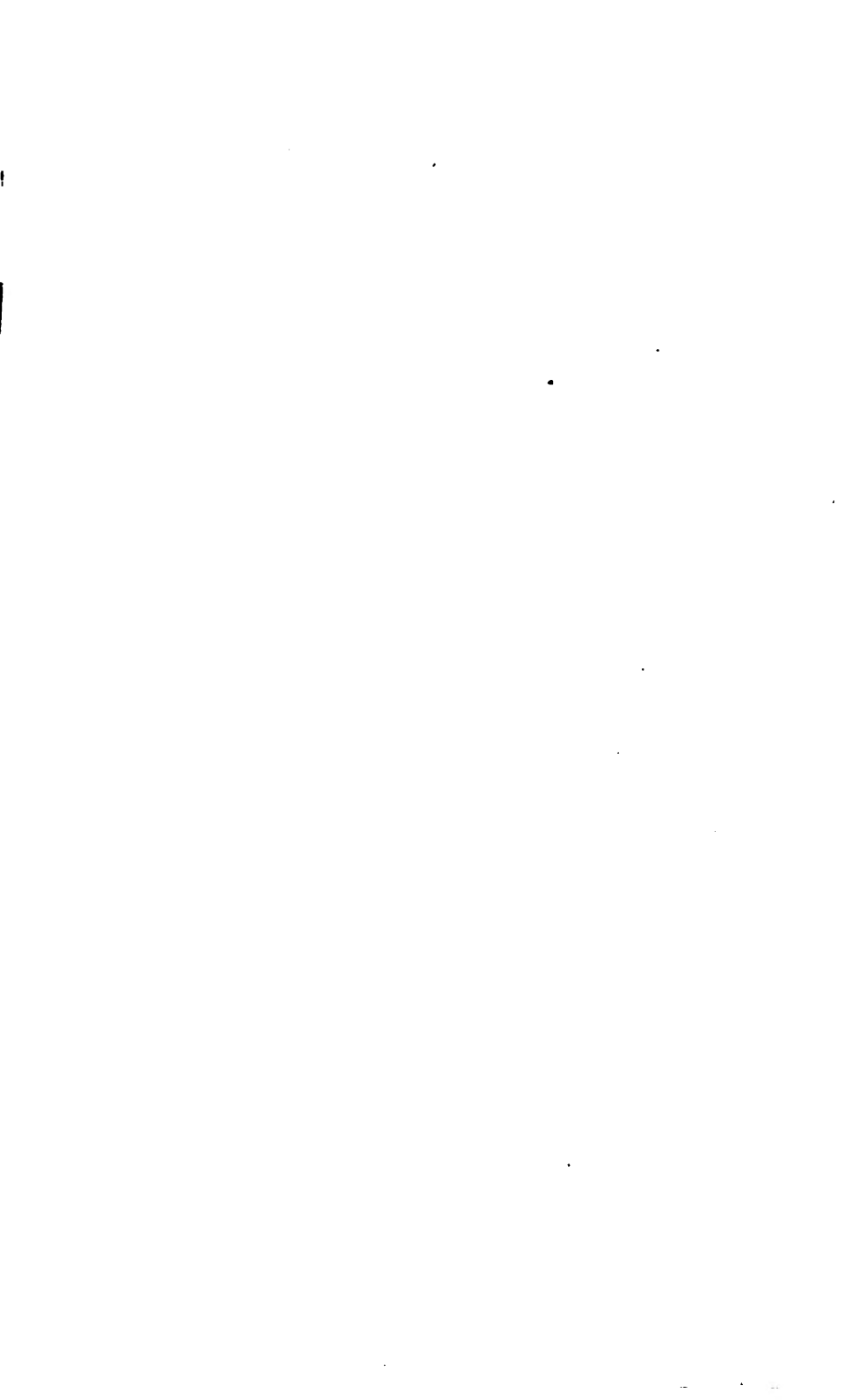
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*Charles Minga
Stirling.*

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THE JOURNAL OF JURISPRUDENCE.

HISTORICAL NOTES ON TITLES OF NOBILITY IN SCOTLAND.

NO. III. LORDS OF PARLIAMENT.

NEXT in historical importance to the dignity of an Earl in Scotland was the lesser title of a Lord of Parliament, more properly so called then a "Baron."

The Scottish Parliament as it existed in the fourteenth and fifteenth centuries, and the greater part of the sixteenth, was an assemblage in one chamber of three separate orders of the community—the Prelates, Barons, and Burgesses. The Earls belonged to the order of Barons. All Barons in the old sense, that is, landholders holding their lands as a barony, had the right, or more properly, were under an obligation, to attend the meetings of the Estates. Parliamentary duty seems to have been understood to be, equally with military service, a condition under which they held their lands. It is expressly specified in the *reddendo* of a unique and interesting charter by Robert Bruce, of date 20th December 1324, of the Isle of Man in regality to his nephew, Thomas Randolph, which has been preserved in Lord Haddington's collections in the Advocates' Library.¹

By the less considerable landholders the obligation to be present was held a grievous burden, and was doubtless not very rigidly enforced; and a statute of James I. in March 1427-28 enacted that the small barons should be excused from attending Parliament, provided they sent two or more wise men from each sheriffdom to represent them. Though this Act, as well as a later one, was a failure so far as regards its main object, the introduction of Parlia-

¹ *Inveniendū inde nobis et hæredibus nostris dictus Thomas et hæredes sui sex naves annuatim quælibet viginti sex ramorum, cum hominibus et victualibus sex septimanarum cum inde fuerint rationabiliter præmoniti, et faciendo personalem appresentationem ad parlamenta nostra et hæredum nostrorum per rationabiles quadraginta dierum summoniciones.*

mentary representation, it was probably held to afford a quasi-sanction to the habitual absence of the "small barons;" while the bestowal of the dignity of a Lord of Parliament on the more considerable of the order, who might regard parliamentary attendance a privilege rather than a duty, contributed further to the same result.

The hereditary degree of Lord of Parliament has been generally and not unnaturally supposed to have been one of the novelties imported from England by James I.; but the ambiguity of the expression "dominus de" habitually applied to persons who did not possess that dignity, and used at a time long before its institution, creates a little difficulty in fixing the date when the title originated. Making all allowance for the carelessness and laxity about designations adverted to in a former paper, our experience of this equivocal word in charters and records would lead us to lay down as a tolerably safe general rule that such a designation as "Hugo Giffard, Dominus de Yester," "Alexander Seton, Dominus de Gordon," or simply "Dominus de Calenter," may be found equally applied to a laird or a Lord of Parliament; but when we find the Christian name without surname followed by "dominus de," e.g. "Willelmus Dominus de Crechtoun," "Patricius Dominus de Glammis," and still more in a designation like "Andreas Dominus *le* Gray," with the title taken from the surname and not the lands, we are almost warranted in assuming that the person referred to is a parliamentary lord.

In the application of this rule we encounter one instance of a designation of the last-named kind used as far back as 1406. In that year Sir William Graham of Kincardine (afterwards third husband of James I.'s sister, the Countess of Angus) appears as "Willelmus Dominus de Graham," or "Willelmus Dominus *le* Graham;" and this style, taken from his name, not his lands, ever afterwards adheres to him, and is inherited by his grandson and successor, generally called the first Lord Graham. It is difficult to avoid the inference that William Lord Graham was a Lord of Parliament, and made so either by Robert III. shortly before that king's death or by the Regent Albany.¹

¹ On the question whether a regent could confer a hereditary dignity, Lord Hailes says: "Of an original creation under a regency there is no example. Indeed there could be none. A regent is a tutor; and the powers of a tutor are limited to ordinary and necessary acts of administration; but the conferring of hereditary titles of honour can never be held an act of ordinary and necessary administration. Hence it was determined in Parliament in 1431 that a regent could not give away from the Crown any lands that had devolved to the Crown by the death of a bastard without heirs. Hence also it was determined in Parliament in 1434 that a regent could not restore a person forfeited for treason. *Sir George Dunbar against the King.*"

But the regency of Robert Duke of Albany was exceptional throughout. Charters were habitually granted by him not in the name of the minor king, but in his own name, as Duke of Albany, Earl of Fife and Menteith, and Governor of Scotland, and under the Great Seal of his office, and dated in the year not of the king's reign, but of his regency. For some curious particulars

But if so, the dignity must have been at that time wholly exceptional. Lord Dalkeith seems to have been one of the earliest titles conferred by James I. From the time of the return of that sovereign from his English captivity, Sir James Douglas is uniformly styled "*Jacobus Dominus de Dalkeith*," the same designation continuing to be applied to his son and grandson until the latter is made Earl of Morton. Arguing from analogy, we must conclude that these Douglasses were Lords of Parliament as early as 1424.

The title of Lord Gordon must have been granted to Sir Alexander Seton between 1430 and 1437. At the Exchequer audit of March 1429-30 he is simply "*Alexander de Seton de Gordoun*;" but at the first audit after the murder of James I. he is "*Alexander Dominus de Gordon*." In September 1439 "a noble lord, Schir Alexander Lord of Gordoun," appends his seal on the part of the Barons immediately after the Earl of Douglas to a historical document of considerable interest, an indenture between Queen Joan and the Livingstones, by which the custody of the young King (James II.) was resigned to the latter, while the queen professed to remit all the rancour which she had conceived against the faction which had violently captured and imprisoned her. In a document in the Gray charter-chest, of date October 1437, Sir Alexander Gordon's son and heir-apparent is called "*ane noble and potent lord*," and further designed "*Master of Gordon*."¹

Various "lords" were made by James II. In 1445 he made George Lesley of Rothes (soon afterwards Earl of Rothes) a Lord of Parliament as Lord Lesley of Leven; and the "*Auchinleck Chronicle*" enumerates among Lords of Parliament made in 1452, "the Lord Dernelie, the Lord Halis, the Lord Boyd of Kilmernok, the Lord

about Albany's Great Seal reference is made to the preface of Exchequer Rolls of Scotland, vol. iv. pp. xlvii-xlix. He certainly conferred on his son John in 1406 the earldom of Buchan, of which he was himself in possession, and granted a charter of the earldom of Ross in 1415 to his granddaughter, the Countess Euphemia, with a new limitation in favour of his own sons; and evidence also exists that if not Duke Robert, at least his son and successor in the regency, Duke Murdoch, who endeavoured, however unsuccessfully, to tread in his father's footsteps, granted a charter of resignation to Alexander Stewart, Earl of Mar (himself in reality only a liferenter), conferring the fee of that earldom on Alexander's natural son, Sir Thomas Stewart. But regarding this last transaction, Murdoch bargained with the hero of Harlaw to endeavour to obtain the confirmation of the captive king, showing that he misdoubted whether such transactions were within the powers of a regent. Most if not all charters of this kind were, agreeably to what Lord Hailes says, openly disregarded by James on his return from captivity. Hence Robert, a younger son of Robert Duke of Albany—who did not, as generally said, fall at Verneuil with his brother John, but survived James' return, and was exempted from the wholesale proscription of his family—though heir under the above-mentioned charters of his father both to the earldom of Buchan and the earldom of Ross, was allowed to succeed to neither, but had a small annuity assigned for his support from the customs of Dundee. Lord Graham died about the time of James' return, and James may have confirmed or renewed the dignity to his grandson.

¹ Riddell's *Peerage Law*, p. 349.

Flemyng of Cummyrnauld, the Lord Borthwik of that ilk, the Lord Lyle of Dowchale, the Lord Cathcart of that ilk."

With the increasing number of lords made in every succeeding reign, the presence of barons who were not lords had practically ceased before the reign of James VI.; but their legal right to appear is considered to have continued until the introduction of parliamentary representation in 1587. It was then only that we came, properly speaking, to have a "peerage" in Scotland, the barons who were Lords of Parliament sitting along with the earls and other higher nobility, and having equal rights with them, which were denied to the barons who were not lords.¹

There were never any baronies by writ in Scotland. On the meeting of every Parliament, besides a general summons sent to sheriffs or other Crown officers to cite the prelates, earls, barons within the jurisdiction, and three or four burgesses from each burgh, there was a special summons sent to each prelate, earl, and Lord of Parliament; but this summons was never supposed to have the effect of the corresponding English writ, of ennobling the person summoned and his heirs.

While a parliamentary lordship or barony, like an earldom, was closely connected with lands, it differed in this, that the possession of a barony did not necessarily make the holder of it a parliamentary baron, as that of an earldom did the holder of it an earl; and therefore the original charters by which this dignity was conferred, while they granted or bestowed *de novo* lands, also explicitly conferred along with them the title of a Lord of Parliament or a Free Baron. There is no reason for supposing that a Lord of Parliament was ever made in Scotland without a charter, or, after the union of the crowns, a patent, though there are many cases in which the original writ of constitution is lost and unrecorded. But over and above the grant constituting the dignity, there was also a formal act of creation, analogous to belting in earldoms, which generally took place in Parliament, and sometimes preceded instead of following the grant. Thus while John of Isla was made Lord of the Isles by a charter dated 15th July 1476, the parliamentary records of 1st July 1476 tell us that he was on that day created and named by the heralds Lord of the Isles, and a Lord of Parliament. On the other hand, Alexander Lindsay, younger brother of the Earl of Crawford, had on 6th May 1590 a charter erecting certain lands and regalities which had been part of the bishopric of Moray into the barony of Spynie, with the title and rank of a free baron to himself, his heirs and assignees, to be called Barons of Spynie; and we learn from Moysie and Sir James Balfour that the investiture took place on 4th November following.

A destination was generally inserted in the charter or patent.

¹ A reminiscence of the previous state of things was preserved in the heraldic usage of allowing supporters to the representatives of all minor barons who had full rights of barony before 1587.

Yet, though liferent titles of nobility cannot be said to have been absolutely unknown in Scotland, it was not presumed, when the words of limitation were absent, that titles any more than lands were conveyed otherwise than in fee, and to heirs of line. Thus on the death of Michael first Lord Balfour of Burleigh, whose patent contained no mention of heirs, the dignity passed, according to the usual law of succession, to his only child, a daughter.

DUKES.

The assertion of Selden that the title of Dux or Duke was occasionally applied "with us," that is, in England, to earls many years before it was a distinct dignity in itself, is so far true that in Saxon England the Ealdorman of Mercia was also called Duke of Mercia. William the Conqueror, Duke of Normandy, may be held to have brought the title as a separate dignity into England; but it was merged in the Crown till the reign of Edward III., who in 1337 conferred the dukedom of Cornwall on his eldest son, Edward the Black Prince, and in 1351 that of Lancaster on Henry Earl of Lancaster. These were dukedoms by tenure, Cornwall being in the one case erected into a duchy, and palatinate jurisdiction being in the other conferred within the county of Lancaster. In later cases the dignity was personal, and unaccompanied with grants of lands and annuities. This seems to have been the case with the dukedom of Clarence conferred on Prince Lionel, and of Lancaster on his brother John, in 1362. Under Richard II. the creation of dukes was always by charter, while there was an inaugural ceremony of girding on the sword in Parliament.

The introduction of the same title into Scotland was in all probability connected with the claims of precedency made by Henry IV. when Duke of Lancaster over the Scottish princes, who were merely earls, at international congresses. The first Scottish dukes were "made" in 1398, namely, David, eldest son of Robert III., who was made Duke of Rothesay, and the king's brother, Robert Earl of Fife and Menteith, who was made Duke of Albany. There are extant notices of the creation, that is, inauguration, of these two dukes both in the Exchequer Rolls and in the Chartulary of Moray. The inaugural ceremony took place in the Monastery of Scone during the celebration of High Mass, when the king "*decoravit eos et vestivit mantellis et pileis furrals solempniter et aliis insigniis solis ducibus competentibus et tradi consuetis.*" The original documents, if any, constituting these titles are not extant, and their limitations are unknown. The dukedom of Albany (the old name for Scotland) seems to have been but an empty honour unconnected with lands.

Regarding the dukedom of Rothesay, the common view of its original limitation, in which Mr. Riddell coincides, accords with Wyntoun's account, namely—

"Til haif that tityl ay,
 And eftyr him as yet wes done,
 All tyme the kingis eldest sone
 And his air suld be alway
 Be titil Duk cald of Rothessay."

Yet the facts seem not easily reconcilable with this view. David Duke of Rothessay died at Falkland on 26th March 1402; and on 10th December 1404 Robert III. granted a charter to his only remaining son, Prince James,¹ "*for his life only*," of the baronies of Renfrew, Cunningham, Kyle Stewart, Ratho, and Innerwick, the islands of Bute, Arran, and the Cumrays, the lands of Cowal and Knapdale, the earldom of Carrick, and the lands of Kyle Regis, in free regality. It has been assumed that Prince James was Duke of Rothessay in virtue either of this charter or of the original charter of his elder brother; yet though his capture at sea and other circumstances cause him to be often mentioned in records and writings of the time during the period between his brother's death (26th March 1402) and his succession to the throne (4th April 1406), yet it is remarkable that on no one occasion is he styled Duke of Rothessay. "Prince" or "Steward of Scotland" is the designation given him.

James II. was in his father's life habitually designed Duke of Rothessay. When less than a year and a half old he is so styled in an Exchequer account rendered 22nd April 1431, where the Linlithgow custumars are allowed the price of 48 lbs. of almonds sent by them to the Castle of Doune for the expenses of the Duke of Rothessay. On the other hand, we have not been able to discover a single instance in which the same title is given to James III. when heir-apparent. Until his accession to the throne he was Prince or Steward of Scotland.

The style, however, was adopted by the son and heir of all succeeding sovereigns. A statute of 27th November 1469² declares that certain lands, of which the first mentioned is the "*dominium de Bute cum castro de Rothessay*," are permanently united, incorporated, and annexed "*principibus primogenitis regum Scotiæ successorum nostrorum perpetuis temporibus futuris*;" and this Act, though the title of duke is not specified in it, has perhaps with justice been considered the foundation charter of the dukedom of Rothessay. Prince Henry, eldest son of James VI., was at his baptism, which took place in the Chapel Royal of Stirling, invested with the dignity of Duke of Rothessay with appropriate solemnities, including the imposition of a ducal crown, when he was also knighted. After the accession of James to the English throne the title seems for a while to have been disused. In writs in the Privy

¹ Preserved in Lord Haddington's collections in the Advocates' Library.

² Printed in the Record Edition of the Acts (ii. p. 186) from a copy in Sir Lewis Stewart's collections in the Advocates' Library, whose authenticity there is no reason to question.

Seal Record for 1603 the heir-apparent is called "our dearest sone Henrie, Prince of Scotland, Walles, and Yreland, Dolphine, and [of] Veyennes." The discussion which arose in 1751, on the death of Frederick Prince of Wales, whether the principality of Scotland and title of Duke of Rothesay went to his son or returned to the Crown, is hardly within the scope of these notes, which have chiefly to do with the period before the Union. The title of Duke of Rothesay was not originally on the Union Roll, but was added to it in 1714 by authority of the House of Lords.

The original dukedom of Albany was attained in the person of Duke Murdoch in 1425; but the same title was successively conferred on Alexander, son of James II., whose son was regent in the minority of James V.; on a son of James V. who died in infancy; on Henry Lord Darnley, husband of Queen Mary; and on Charles I. at his baptism.

The title of Duke of Ross was given by James III. to his second son James, whom he perhaps meditated making his successor to the throne, and who became Archbishop of St. Andrews; and the same king, on the eve of the rebellion headed by his son, in which he lost his life at Sauchieburn, bestowed on one of his faithful adherents, David fifth Earl of Crawford, the dukedom of Montrose, the first instance of that title being conferred on any one not a member of the royal family. That charter, dated 18th May 1488, narrating Crawford's loyalty and manifold services, and his wish that "he should shine with more ample dignity," created him a duke, to be designed "in perpetual future times Duke hereditarily of Montrose;" after which follows the conveyance of the castle and burgh of Montrose, with its customs and fisheries, Kinclevin in Perthshire, etc., all incorporated into the dukedom of Montrose, to be held in free regality on the tenure of a red rose, to be paid yearly on St. John Baptist's Day.

The immediate result of the defeat and death of the king was the disgrace of his adherents, Crawford included, and an Act rescissory annulling all grants of lands, offices, and dignities conferred by the king during the preceding eight months. But James IV., on approaching manhood, forsook the counsellors who had instigated him to rebel against his father, put on in token of his repentance a chain of iron round his waist, which he wore till his dying day, and gave on 19th September 1489 a fresh grant of the dukedom of Montrose to the Earl of Crawford, containing a similar narrative of his services to the Crown; but the title was not assumed by his successors. The grandfather of the present Earl of Crawford claimed that dukedom in 1852; and the Committee of Privileges found his claim not proved on the ground that the charter of 1488 had been annulled by the Act rescissory, and that of 1489 only granted the dignity for life. The former reason seems to be at variance with the decision of the Court of Session on the same point in the Glencairn case in 1648.

The dukedom of Ross conferred on Henry Lord Darnley, of Orkney conferred on the Earl of Bothwell with his marriage with Queen Mary, and the dukedom of Lennox given to Esmé Stewart, Earl of Lennox, cousin german of Darnley, were the only other titles of this kind bestowed before King James VI. went to England.

Considerable jealousy existed among the Scottish feudal lords regarding this title, which, except in the one instance of Montrose, had been confined to near relations of the royal house. James Earl of Arran, though Regent of Scotland, and next heir to the throne in Queen Mary's minority, had to derive his dukedom of Chatelherault from France. According to Hume of Godscroft, Mary of Guise was deterred from her intention of making Huntly a duke by the threats of the Earl of Angus. "By the might of God," said Angus, "if he be a duke, I will be a drake," *i.e.* he would be above and before him.

Albany seems to have been the only Scottish dukedom that did not possess more or less of a territorial character. The dukedom of Ross, held by the second son of James III. along with the title of Marquess of Ormond, Earl of Eddirdule, and Lord of Brechin and Navar, was accompanied with a corresponding grant of lands; however, on getting the see of St. Andrews, the duke resigned his estates, reserving, it may be remarked, the principal messuage or motehill of each estate for life, in order to retain the honours. In like manner, as late as 1581 the charter of the dukedom of Lennox to Esmé Stewart, already Earl of Lennox and Lord Darnley, erects the earldom of Lennox into a "dukerie," and the lordship of Darnley into an earldom.

MARQUESESSES.

In England the title of Marchio, borne by the Lords Marchers or Wardens of the Marches of both Wales and Scotland, had been long in use before the parliamentary dignity was introduced. The first instance of the bestowal of the title of Marquess as a hereditary dignity was in 1377, when Robert de Vere, Earl of Oxford, was made "Marquess of Dublin," with a seat among the Peers of Parliament "in the higher grade," that is, between the dukes and earls.

The first marquesate in Scotland was that of Ormond, already mentioned as included among the titles of James Duke of Ross, and bestowed on him on 23rd January 1480-81, at his christening. The only other instances of this title before the union of the crowns are the marquesates of Hamilton and Huntly, conferred respectively on the second son of the Duke of Chatelherault, and on George Earl of Huntly, both in 1599. After that event the dignity became more frequent, and was sometimes conferred along with a dukedom; we had Marquesses of Douglas, Montrose, Athole, Queensberry, Tweeddale, Lothian, Annandale, Angus, and Tullibardine.

The marquesate of Queensberry presents a curious example of

the undesigned emergence of a title. It was bestowed in 1682 on the third Earl of Queensberry, who two years afterwards was made Duke of Queensberry, in each case with remainder to males. While in virtue of a resignation and regrant of 1706, the dukedom and other honours went to the Duke of Buccleuch, the marquesate, from having been accidentally omitted in the regrant of 1706, was found to have passed in terms of the original patent, but without the bulk of the estates, to the heir-male.

VISCOUNTS.

The title of Viscount was unknown in Scotland till 1606, when the nephew of the regent Earl of Mar, Sir Thomas Erskine of Gogar (afterwards advanced to the dignity of Earl of Kellie) was made Viscount Fentoun. Of the seventeen viscounts in the Union Roll, the oldest, Viscount Falkland, only dates from 1620.

DIGNITIES FOR LIFE.

Titles of nobility for the life of the grantee only were not altogether unknown in Scotland. A very curious instance, not generally known, occurs in 1403, of an earldom given for the life not of the grantee, but of the sovereign who granted it. On 2nd September of that year, soon after the death of David Duke of Rothesay, the earldom of Athole, which that prince had possessed from 1398, was bestowed on Robert Duke of Albany, the king's brother, in free regality, for the life of Robert III., only with a remainder to the grantee's son John.¹ On the king's death, on 4th April 1406, both grant and reversion fell, so Albany's tenure of that earldom lasted but two years and a half. The bestowal of the title followed the parliamentary investigation, whose result was the acquittal of Albany from the charge of foul play towards his nephew.

As early as 1427 we have a life-earldom in the ordinary sense. When James I. deprived Malise Earl of Strathern of that dignity on the pretext of its being a male fee, he conferred the earldom of Strathern in liferent on his uncle, Walter Earl of Athole.

The already-mentioned confirmation of the dukedom of Montrose to the Earl of Crawford in 1489 has been represented as a liferent dignity, though it would rather appear that it was not really intended to operate as such. The retention for life of the dukedom of Ross by the brother of James IV., under his resignation of 1503, when made Archbishop of St. Andrews, can hardly be included in the same category, and it may be therefore doubted whether there are any instances except Strathern of titles of nobility conferred for life only till after the middle of the seventeenth century. These late instances include the title of Duke of Hamilton, conferred in

¹ A transcript of this charter is to be found among an interesting collection of charters relating to Scotland in the Harleian MSS., 4694.

1660 on William Earl of Selkirk, husband of Anne Duchess of Hamilton; the earldom of Tarras, bestowed the same year on Sir Walter Scott of Haychester, husband of Mary Countess of Buccleuch; the titles of Lord Burntisland given to the husband of Margaret Countess of Wemyss in 1672, and of Lord Glassford to the husband of Anne Baroness Sempill in 1685. These titles were evidently all granted in consequence of the gradual decay or disuse of the old courtesy of Scotland, which accorded his wife's title to the husband of a peeress.

THE TITLE "MASTER."

Among the minor peculiarities of Scottish hereditary dignities is the employment of the word "Master" as a courtesy title, a usage probably borrowed from France. It was first applied to the heir-apparent of an earldom. The grandson of Walter Earl of Athole, who was executed for treason in 1437 as one of the conspirators against James I., was styled "Master of Athole." The eldest son of Robert first Lord Erskine, and Earl of Mar, is called "Master of Mar" in the Exchequer accounts of 1446; and in the following century the disinherited eldest son of David eighth Earl of Crawford obtained an unenviable notoriety as the "Wicked Master of Crawford."

Sometimes the person so designated was only heir-presumptive, not heir-apparent. James ninth and last Earl of Douglas, who was forfeited in 1455, enjoyed in the lifetime of his brother, whom he succeeded, the title of "Master of Douglas;" and the designation "Master of Mar" was enjoyed by Alexander Erskine of Gogar, younger brother of the Earl of Mar restored by Queen Mary, and father of the first Earl of Kellie, who could only have been heir-presumptive at a period anterior to Queen Mary's recognition of his brother's title. George Seton, younger brother of the second Earl of Winton, was, previously to the resignation of his elder brother in his favour, styled "Master of Winton."

An early instance of the application of the term to the heir-apparent of a Scottish Lord of Parliament—a usage which subsists to the present day—occurs in the case of the eldest son of Sir Alexander Seton of Gordon, otherwise Lord Gordon, who in 1437 was styled "Master of Gordon."

An example can be pointed out in the seventeenth century of the title of Master being conferred *separatim*, namely, a conveyance of the dignity of Master of Forrester to the heir-apparent of Lord Forrester in a regrant of 1651.

Instances occasionally occur of one of two dignities of the same kind possessed together being assumed by the heir-apparent. Archibald fifth Earl of Douglas styled himself Earl of Wigtoun in his father's lifetime; and we find the son of the fourth Lord Elphinstone called Lord Kildrummy.

RECENT DECISIONS RELATING TO EXPENSES.

WE propose noting some of the cases bearing upon the subject of expenses of process decided during the last six or seven years, grouping them under various heads.

GENERAL QUESTIONS.

In the case of *Young v. The Nith Commissioners* (June 10, 1880, 7 Ret. 891) it was held that where statutory commissioners were found liable in expenses *qua* commissioners, the question of a further personal liability in the event of failure to recover from the funds in their hands being reserved, it was incompetent to bring another action to dispose of this reserved question. The Lord Justice-Clerk said, "The reservation in the former judgment was intended to suspend the trial of this question against the commissioners until it should be seen whether they had in their hand sufficient trust-funds to meet the decree. If, on the one hand, personal liability was within the former action, it was not then decided. If, on the other hand, personal liability was not within the conclusion of that action, it is impossible in this or any other action to make the expenses of a previous action available. That is well settled by decisions." And Lord Gifford, while not prepared to say that there might not be cases where "it is competent to raise in a new action such an ulterior question of personal or individual liability," still thought that what was asked to be done here should have been done in the former action. Lord Young pointed out that the question of expenses "is always an incident in the cause in which the expenses are incurred. Here in the former action the question of expenses was decided at the same time as the merits, with the reservation of all questions in the event of the funds of the trust being insufficient to implement the decree; . . . and if it turned out that after all the defenders were right, and there were no funds, the pursuers were then to come to the Court and make a motion under the reservation." It may therefore be laid down as settled law that an action for expenses is incompetent even where there are questions reserved.

The case of *Hislop v. Thomson* (March 20, 1878, 5 Ret. 794) is of some importance, bearing upon the question of the expense of stamping a document in process. The general rule is as laid down by the Lord President to this effect: "Where a document on which both parties are entitled to found is founded on by one of them, and being unstamped, requires to be after-stamped at his expense, he is entitled afterwards to recover one-half the expenses from the other party." But he doubts whether such is the result where the document is found by a subsequent judgment of the Court to be worth nothing, at least for the purposes of the suit.

He thinks the adversary would be justified in taking up this position: "You have founded upon a document which is not worth the paper it is written on, and I am not to be compelled to pay for stamping it." In this case there was an obligation which the Court held had been extinguished before the action was raised. The judgment delivered by the First Division was after consultation with the other Inner House judges.

The case of *Macdonald v. Macdonalds* (June 7, 1879, 6 Ret. 1011) is an authority to the effect that where parties in a legal process follow a course sanctioned by Act of Parliament, want of success will not necessarily involve them in expenses. The defenders here were next heirs of entail, who refused to give their consent to a petition for disentail. The decision of the questions which arose relating to their interests was against them, but the Court found no expenses due to or by either party. "In this inquiry," remarked Lord Gifford, "I think these heirs are entitled to appear for their interest. I think also that they are entitled to appear without being liable in expenses, unless they unnecessarily and unreasonably occasion expense, or unless they take unfounded or frivolous objections. The inquiry must go on whether they appear or not, and it may often happen that their appearance, and even their opposition fairly stated, may save expense instead of creating it."

JOINT DEFENCE.

A good illustration of the principles applied to the case of joint defenders is afforded by the decision in *Robertson v. Stewart* (July 15, 1875, 2 Ret. 970). Two defenders, after the record in their case was closed, had their defence conducted jointly. In the Court of Session the case went against them, one compromised, the other appealed to the House of Lords and obtained a reversal of the judgment pronounced in the Scottish Court, and with "expenses incurred by him." The question came to be, What were the expenses which he was entitled to recover—the whole of the joint expenses incurred under the joint defence, or one-half, as representing his own proper share? The Court held that he was only entitled to one-half, and in addition, of course, any separate expense to which he might have been put. "I do not see," observed the Lord President, "that in these circumstances one of the two joint employers can be held, in a question with the opposite party to the action, to have incurred the whole of the account. He may be so held in a question with the agents to whom he has incurred a joint liability along with his co-defender, but that is a matter with which his opponent has no concern." The reason why he had no concern with it was because in the event of this defender having to pay the whole of the account to his agent, there would at once arise a claim of relief against the co-defender to the extent of his share. The same desire to keep within proper bounds this claim

for expenses appears in the case of *Bunell v. Simpson & Co.* (July 19, 1877, 4 Ret. 1133), which was a petition for limitation of liability under the Merchant Shipping Act of 1862, in which it was held, in the first place, that claimants having the same interest and ground of claim should not be allowed the expense of separate appearances; and in the second, that claimants whose demands were unopposed should recover nothing beyond the expense of preparing and lodging their claim, and one appearance of counsel to have decree. Again, in the *Copper Company of Canada v. Pddie* (Dec. 22, 1877, 5 Ret. 393) the rubric is as follows: "In a petition by the judicial liquidator of a company for settling the list of contributories separate appearance was made for two sets of respondents. The Court having negatived their liability upon a ground common to both sets of respondents, allowed only one award of expenses against the liquidator, although the answers for one set of respondents contained separate averments and pleas which might have come to be of importance." In giving judgment the Lord Justice-Clerk said, "It is a wholesome general rule that there should be only one award of expenses against the unsuccessful party." Lord Ormidale concurred in the result, but remarked, "I would avoid, however, laying down any general rule in regard to questions of this sort."

TRUSTEES.

The question of the right of relief competent to trustees who have unsuccessfully defended the trust-estate against that estate for their expenses in so doing came up in the case of *Watson* (Jan. 20, 1875, 2 Ret. 344). In that case two issues were sent to the jury, upon the first of which, dealing with the capability of the trustee to make a deed, the defenders were successful, while upon the second they failed, the jury finding that the deed had been impetrated by one of the legatees. In giving judgment the Lord President said, "The jury found for the defenders on the first issue, and thus completely negatived the allegation that the testator was incapable of making a deed. Had the verdict on that issue been different, it might have been an important consideration in the question of expenses, that the trustees ought to have satisfied themselves of the testator's capacity. If trustees have been accessory to impetrating a deed, it is very obvious that that is a ground for refusing their expenses or finding them liable in expenses. On the other hand, if they have defended the deed in good faith, they will be, as a general rule, entitled to their expenses. But it is more to the purpose to say that every case of the kind depends upon its own circumstances." The peculiarity of *Watson's* case was, of course, that the trustees had defended upon both issues with divided success. Had they been in the position of ordinary pursuers, it is clear that they could not have recovered expenses, and as regarding the practical result of the action they were really unsuccessful, they would in all probability

have been compelled to pay the pursuers. Lord Deas thought very little turned upon the success of the trustees in the matter of the first issue, but considering the whole question one of circumstances, he held that in this particular case the trustees were fairly entitled to defend the deed, while he condemned any attempt to apply a general rule. We have, on the other hand, an instance of an executor being found personally liable in expenses in the recent case of *Law v. Humphrey* (July 20, 1876, 3 Ret. 1192). The action was upon a bill, and a proof of onerosity had been improperly allowed in the Sheriff Court. The executor, who was the defender, had made certain allegations with reference to fraud and facility which the Court held he must have known to be untrue. In the case of the *Copper Company of Canada* already referred to, the official liquidator was "found liable in expenses to persons who had successfully resisted being placed on the list of contributories, although the assets of the company in the liquidator's hands were admittedly insufficient to meet these expenses."

EXPENSES CLAIMED BY AGENT DISBURSED.

The only recent case deserving notice under this head is that of the *Portobello Pier Co. v. Clift* (March 16, 1877, 4 Ret. 685). It has been decided long ago that where there are counter-awards of expenses the plea of compensation may be taken against the agent disburser. Clift's case decides that the authorities apply even where the counter-awards have been pronounced in separate actions, if these actions related to the same matter and could have been conjoined. The Court thought the best way of giving effect to the plea of compensation was by refusing to allow extracts to go out in the agent's name.

HUSBAND AND WIFE.

In consistorial cases the Courts are in the matter of expenses usually disposed to favour the wife, whose right to resist, within reasonable limits, any attempt at a dissolution of the marriage tie is quite recognised. Want of success upon her part is not necessarily a ground for refusing expenses. Thus in the case of *Symington v. Symington* (Dec. 3, 1875, 3 Ret. 205), although the husband succeeded in obtaining a recall of inhibitions and arrestments used against him by his wife, she was found entitled to the expense of resisting his petition for recall. She had pleaded that she was entitled to security for future aliment. The Court refused to recognise her right to demand such security, and as all the debt due to her by her husband had been paid, they set his funds at liberty. In another case between the same parties (July 6, 1877, 4 Ret. 993) Mrs. Symington was found entitled to the whole expenses of following her husband to America, and recovering there the children of the marriage whom he had taken with him. He had left this country

pending a question relating to their custody which was afterwards settled in her favour by the Court of Session, a warrant for interim execution having been granted to her pending her husband's appeal to the House of Lords.

But, on the other hand, there are limits, and it may be now laid down that in any action of divorce in which the wife's guilt has been clearly established by the Outer House proceedings, she must pay for the luxury of an appeal to the Inner. Thus in *Montgomery v. Montgomery* (Oct. 22, 1880, 8 Ret. 26), in making an interim award of expenses to a wife who had been divorced by the Lord Ordinary but who had appealed, the Lord President said, "It must be distinctly understood that it is towards the expense of the proof that this sum is to be applied, and not towards the expense of printing the proof, which forms part of the expense of this reclaiming note." The following remarks of the late Lord Ormisdale in the recent case of *Kirk v. Kirk* (Nov. 12, 1875, 3 Ret. 128) are worthy of noting. He says, "I should regret much if it were to be held by the Court as a settled matter that a wife, defender in an action of divorce, is in all circumstances entitled, at the expense of her husband, to reclaim against an adverse judgment of the Lord Ordinary. On the contrary, the just and reasonable rule appears to me to be that the question how far the successful husband, pursuer in an action of divorce, is to be made liable for the expenses incurred by his wife in resisting the action is always one for the Court, in the fair exercise of its discretion, to determine according to circumstances." As Lord Gifford puts it in *Dalgleish v. Dalgleish* (Feb. 21, 1878), "a wife must show that she had a probable case before we can hold her entitled to get the expenses of a reclaiming note."

CAUTION FOR EXPENSES.

The Court are very unwilling to ordain a defender to find caution for expenses. The case of *Weir v. Buchanan* (Oct. 18, 1876, 4 Ret. 8) affords an illustration. The effect of the Lord Ordinary's judgment in that case was to render the defender insolvent, but he was allowed to reclaim without finding caution. He was in the position, as pointed out by the Lord President, of being "provisionally insolvent." The Inner House would not take for granted that the Lord Ordinary was right. As to mandatories, it was decided in the case of *Chapman v. Balfour* (Jan. 8, 1875, 2 Ret. 291) that where mandatories withdrew upon the morning of the day fixed for a jury trial, they were nevertheless liable for the fees paid to counsel and agents, witnesses and jury. The defender had put the latter in the box and taken a verdict. "The only question" remarked the Lord Justice-Clerk, "of any difficulty is in regard to the payment of the jury. The defender might have obtained decree by default without taking a verdict, but I think the defender was not bound to adopt that course, and that the mandatories are liable for the payment to the jury."

JURY TRIALS.

This class of cases raises a number of questions relating to expenses, as the same issues may be tried more than once with different results, or a verdict may be returned for nominal or relatively nominal damages. The general principles applied to this matter of expenses in jury trials having been already stated, we merely note one or two recent illustrations. In *Pirie v. Meikle* (Oct. 23, 1874, 2 Ret. 40) the pursuer, in an action of damages for assault, who sought £500 and received by the verdict £5, was found entitled to expenses. But this was a counter-action brought in connection with one for slander between the same parties, in which the pursuer recovered only 1s. of damages, and failing to obtain the necessary certificate under the Court of Session Act, was not found entitled to his expenses. "I refused to grant the certificate," said the Lord President, "because I thought it was not a case suitable to be tried in the Court of Session. But a demand is made for expenses in the action for assault. The result of the evidence was that the assaulted man was not prepared to bring any action until brought into this Court by the action for slander. But when that action was brought, he brought the action for assault as a set-off to the other action." In *Steel & Craig v. The State Line Steamship Co.* (Feb. 5, 1878, 5 Ret. 622), pursuers, ultimately successful in a second trial, were found liable in the expenses of the first, in which a special verdict had been given. The ground was because it was the pursuers' business to have raised the question upon which they were ultimately successful at the first trial, and this they had failed to do.

In *Black v. Mason* (March 18, 1881, 8 Ret. 666) the trial had lasted three days, and each day the Court sat from 10 A.M. until 6.30 P.M. The successful party sought to recover more than the ordinary fees to counsel, but the Court held it to be just an ordinary jury trial, and following the rule laid down in previous cases, approved of the following fees, viz. twenty, fifteen, and ten to senior, and fifteen, ten, and seven to junior counsel. The question raised was one of right of way. Compare this case with that of *Tannett, Walker, & Co.* (Jan. 31, 1874, 1 Ret. 440).

In conclusion we note one or two points under the head of taxation. In *Graham v. Borthwick* (June 12, 1875, 2 Ret. 812) the Auditor disallowed the expense of the examination of a witness who had been brought from the south of England to Dumfriesshire in order that her evidence might be taken to lie *in retentis*. She had been subsequently examined in the ordinary way. The Court held that the expense "ought to be allowed to the amount which would have been incurred if the deposition to lie *in retentis* had been taken at Plymouth without sending agents there." In taxing between party and party the Court have refused to sanction charges in excess of the maximum allowed by the table of fees fixed by Act of

Sederunt, July 15, 1876 (*Consolidated Copper Company*, Jan. 17, 1878, 5 Ret. 531). In this case there were upwards of a hundred respondents, and it was contended that in consequence of this number the ordinary sums allowed to agents for instruction and in name of Session fee were insufficient. When expenses are given subject to modification—the modification is entirely a matter for the Court—the Auditor taxes in the usual way, and disallows such expenses as are connected with portions of the case in which the party may have failed. The modification is in addition to what he may take off. We refer to the Auditor's report, approved of by the Court, in the case of *M'Elroy v. Tharsis Sulphur and Copper Company*, June 28, 1879, 6 Ret. 1119.

IMPLIED CONTRACT THAT GOODS SOLD BY A MANUFACTURER ARE OF HIS OWN MAKE.

IN the recent case of the *West Stockton Iron Co. v. Nielson & Maxwell* (July 3, 1880, 7 Ret. 1055) a point of considerable importance was decided by the Second Division of the Court of Session. It was there held that when a manufacturer tenders goods of equal value with those manufactured by himself, in implement of a contract for the sale of such goods, the purchaser is not entitled to refuse them. In other words, that there is no implied stipulation on the part of the manufacturer that the goods shall be of his own manufacture. In little more than six months the same question, under almost exactly the same circumstances, again came before the Court in *Johnson & Reay v. Nicholl & Son* (Jan. 25, 1881, 8 Ret. 437), and the Second Division confirmed the principle previously laid down. This adjustment of the rights of manufacturers, however, did not apparently prove acceptable to the parties interested in England, and accordingly the English Courts were called upon to give a decision upon the question in *Johnson & Reay v. Raylton, Dixon, & Co.* (June 26, 1881, 7 Law Rep. Q. B. D. 438). The facts were precisely the same as in the second case decided by the Court of Session, but the English Court of Appeal, by a majority (Bramwell, L.J., dissenting), arrived at an opposite result, holding that on the sale of goods by a manufacturer of such goods there is an implied contract that they shall be of his own manufacture. The law can hardly be considered as settled, for the House of Lords will soon be called upon to decide the question. As it stands at present, however, we have this curious and somewhat inconvenient result, that north of the Tweed manufacturers have rights and advantages which are denied them the moment they cross the Border. This in itself makes these decisions interesting, apart from the importance of the legal principle involved to the manufactur-

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ing community, and the fact that the question is entirely new, there being absolutely no previous authority either in England or Scotland for it.

The facts were in every case almost precisely the same. In the *West Stockton* case, the defenders, who were iron and metal merchants in Glasgow, entered into a contract with the pursuers through their brokers for the purchase and sale of 200 tons of iron ship-plates, to be delivered during the first six months of the year 1878. The contract was contained in a bought and sold note, signed by both parties, and which specified the amount, quality, and price of the article sold, and regulated the mode and terms of delivery. The only stipulation as to quality was that it should be such as "to pass Lloyd's surveyor;" nothing was said about its being of the pursuers' own manufacture. Iron ship-plates are not kept in stock by manufacturers, but are only supplied according to specifications; and as the defenders failed to furnish specifications, as they were bound to do, delivery was not completed at the expiry of the time agreed on. It was then, of course, open to the pursuers to have cancelled the contract and sued the defenders for damages for its breach. They, however, did not see fit to do this, for the obvious reason, apparently, that with a falling market their contract was becoming more valuable; but instead they granted an extension of time with this result, that owing to things in Glasgow being "about at a standstill," specifications were still not forthcoming, and in consequence they had at length to close their works and arrange with other manufacturers to supply the plates still undelivered under the contract. They intimated this to the defenders, who, after sending specifications for a small quantity of iron, finally took up the position that they were not bound to receive any plates except those of the pursuers' own manufacture, thus raising the question which has caused such a difference of opinion. The pursuers, on receiving this intimation, raised an action for damages for breach of contract in respect that Nielson & Maxwell were bound to take delivery of the ship-plates undelivered under the contract, although not manufactured by the pursuers, and that they had failed and refused to do so. It was admitted that the iron offered was equally good, and of equal marketable value, with that of the West Stockton Co.'s own manufacture, and a proof was allowed of an alleged custom in the iron trade, whereby a manufacturer who is from any cause unable to deliver iron of his own manufacture, may deliver iron of equal value manufactured by another. The evidence, however, was unsatisfactory and conflicting, and the Lord Ordinary (Young), holding that no such custom had been established, and that the contract was for plates of the West Stockton Co.'s own manufacture, "from the very fact of its being made with them," assoilzied the defenders. The West Stockton Co. reclaimed, and the Second Division, by a majority, reversed this judgment.

Lord Young, who in the interval had taken his seat in the Inner House, dissented, and defended his decision in the Outer House; and the late Lord Ormisdale, not having been present at the hearing, declined to give an opinion; so that only three judges heard the case during its whole passage through the Court of Session, instead of the usual number of five. This circumstance is mentioned because Lord Justice Brett seems to derive comfort from the reflection that his opinion is shared by two of the judges in Scotland. He says, "I notice, however, that the Lord Ordinary and Lord Young agree with the view which I, in the end, think right." Such an oversight is no doubt highly excusable, but surely it is worth the while of those who are responsible for the correctness of the English Law Reports to have them accurate even in so trifling a matter as the names of the judges of the "Court of Sessions."

The question was not allowed to rest here, for a short time afterwards the case of *Johnson & Reay v. Nicholl & Son* came up before the same Division, and the doctrine laid down in the *West Stockton* case received what may be called its finishing touches. The facts were indeed slightly different, and relying on this difference, the defenders endeavoured to show that the rule formerly laid down should not be applied here. They were unsuccessful, however, the Court again holding that they must accept the iron offered. Though expressly recognising the case to be governed by the previous decision, Lord Craighill, who had taken the place of Lord Gifford, delivered an opinion in support of the judgment, which must be held to express his independent view. Its reasoning is characterized by Lord Justice Bramwell as "unanswerable."

So stood the law in Scotland. The "Court of Sessions" had trampled on the rights of the unhappy purchasers when they bethought themselves of appealing for justice to the Courts across the Border. Accordingly Messrs. Raylton, Dixon, & Co., a firm of shipbuilders in Middlesborough, who had a contract with Johnson & Reay, *mutatis mutandis*, in precisely the same terms as that of Nicholl & Son, invited the manufacturers to make good their claim according to the law of England. Johnson & Reay accepted the invitation, and the case was tried at the last Spring York Assizes before Mr. Justice Manisty. The defendants admitted that the plates would be substantially as good as if manufactured by the plaintiffs, but they insisted that they had a right to plates of the plaintiffs' own manufacture, and offered to prove that in the iron trade there is a custom, that under a contract between a manufacturer of iron plates and a customer for the supply of plates, the seller must, in the absence of stipulation to the contrary, supply plates of his own make. This was refused, as contradicting the terms of the written contract, and the learned judge being of opinion that the contract did not import that the iron plates

should be of the plaintiffs' own manufacture, gave judgment in their favour. The defendants appealed, and the Court of Appeal reversed this judgment, holding unanimously that the evidence as to a custom of the iron trade had been improperly rejected, and that the defendants were at least entitled to a new trial. It was further held, by a majority (Bramwell, L.J., dissenting), that even without such evidence the defendants were entitled to succeed, as the contract implied that the plates to be supplied should be of the manufacture of the plaintiffs.

The facts being practically the same so far as the general principle of law is concerned, the three cases may be discussed together. It will be convenient at the outset to dismiss the question as to the existence of any custom in the iron trade, whether in favour of one side or the other. In the *West Stockton* case it can hardly be said to have been established that it is customary for one manufacturer to supply the plates of another, while in *Johnson v. Raylton*, although the evidence of a custom of an opposite kind was refused, the idea of leading it at all was clearly an afterthought; and Lord Justice Bramwell probably gauged its effect correctly, had it been allowed, when he said, "I have a strong opinion that any evidence that may be given in support of this alleged custom would be evidence to show that whenever any one orders goods of a maker he expects that maker's make. That of course would not be enough." Taking it, then, that no custom exists, the only other questions which arose were these, viz. first, the question of fact, whether or not the terms of the contract contained the stipulation that the goods sold should be of the seller's own manufacture; and secondly, the question of law, whether, assuming the contract to be absolutely silent on the point, such a stipulation should be implied from the nature of the contract. In regard to the first question, the judges in both Courts may be said to have held unanimously that the purchasers were not entitled to refuse the plates tendered from any construction to be put on the terms of the contract, and it was only as to the second and more important question that any difference of opinion arose. It seems extraordinary that so important, and one would imagine so elementary, a question in mercantile law had never been decided before, yet, as Lord Justice Cotton observed, there was no authority either in the decided cases or the text-books on the subject. The question was therefore discussed on principle, and we have seen that the result was a serious conflict of judicial opinion, the decision of the Court of Session being directly opposed to that of the English Court of Appeal, though neither Court was unanimous. Up to a certain point, however, notwithstanding the great difference in the result, not only both Courts but all the judges agreed. They all agree that where the manufacturer has a peculiar make, a brand known in the market, even if he has a known name, or if it can be supposed that there

is any *pretium affectionis*, he is bound to supply goods of his own make, even if there be no stipulation to that effect in the contract. Where the conflict of opinion commences is when none of these elements are present, where the article sold has no special repute, or name, or other distinction, but is such that one maker's make is as good as another's. The majority of the English judges, and Lord Young, held that the rule is absolute, and subject to no exception, that every manufacturer, dealing as such, is, in the absence of stipulation or custom to the contrary, bound to supply goods of his own manufacture. The majority of the Scottish judges, and Lord Justice Bramwell, held that in certain circumstances an exception should be recognised, and that if there is no peculiarity in the make or quality of the goods, the manufacturer may tender those of another maker.

The difference of opinion on the Bench is the best proof that much may be said on both sides, and that it is hazardous to express any preference. On the whole, however, we venture to think that the view taken by the majority of the Scottish judges, and Bramwell, L.J., is the correct one. When parties have reduced a contract to writing, thus showing that it was entered into with a certain amount of deliberation, the law has always been slow to insert a term which the parties might have put in for themselves, and, as Lord Justice Bramwell remarks, this "ought never to be done without some most cogent consideration." Now, is there any such "cogent consideration" in this case? One can easily understand why an order for a pianoforte from Erard or Collard implies, though the condition be not expressed, that the article is to be of the manufacturer's own make. The make is different from that of other manufacturers, and the maker's name gives the article a certain value in the market. That is the reason, and apparently the sole reason, for importing any unexpressed stipulation into the contract. But in the present case this reason is entirely absent. The goods sold were admitted to be in no way peculiar either in make or as to the manufacturer's name. On the contrary, the contract stipulated for a certain standard quality, and the purchasers admitted that though they got iron of another manufacturer, they would get, so far as quality and value was concerned, exactly what was contracted for. The addition of an implied term to the contract, that the goods shall be of the manufacturer's own manufacture, can only be justified on the ground that the purchaser cannot reasonably be supposed to have gone to the manufacturer on any other footing. But is it not rather unreasonable to hold that without any rational or definite motive the purchaser should invariably select a manufacturer because he relies on getting the manufacturer's own goods? *Ex hypothesi* there is no peculiarity either in the make or quality, and the purchaser must be assumed to know this when he enters into the contract. What reason, then, has he for relying on getting the

manufacturer's goods only? The meaning of the decision of the English Court of Appeal is simply this, that whether rationally or irrationally, he always has such a reliance. We think this is going too far, and that a purchaser is not always impelled to buy from a manufacturer because he relies on getting his make only. If a number of business men were asked the question, they would say that they go to a particular manufacturer in many cases without a thought as to whose goods they were to be supplied with, and without any reliance whatever upon getting the manufacturer's own make. Lord Justice Brett seems to have been conscious of this difficulty, for he says, "If there be no such contract as is suggested, a manufacturer under the stated circumstances may supply goods not manufactured by himself, inferior to his own usual manufacture." He then attempts to justify the reasonableness of assuming that the purchaser always has this reliance by holding out this alternative consequence. With all respect, we think his Lordship's observations on this matter are somewhat unfounded, for it is difficult to see how a purchaser could be prejudiced in the way suggested. His interests seem sufficiently guarded by this condition, that the goods tendered, by whomsoever manufactured, must be of the quality stipulated for by the contract; and if he can show that there is any peculiarity about the goods which gives him a real interest in refusing them when not of the seller's own manufacture, the Court will not oblige him to accept them. Moreover, if he does rely on getting the manufacturer's own goods, whether with or without reason, he can always insert a stipulation to that effect by the use of a single word, and it seems more equitable and also more convenient to lay this burden on him than to compel the seller to introduce a contract reserving the right to tender the goods of other manufacturers. There are undoubtedly very many manufacturers who turn out articles which from their nature do not and cannot possess any peculiarity or any superiority over similar articles manufactured by other makers, and it does seem a somewhat arbitrary proposition to hold that the Court will not inquire into the nature or quality of the articles at all, but will in all cases compel the manufacturer to supply those of his own make. The nature and quality, we think, are in some respects the most important feature of the contract. Any one who contracts with a manufacturer as such knows, or ought to know, what sort of goods he manufactures, and if he knows that they differ in no respect from the goods of other manufacturers, there is no hardship in making him accept another manufacturer's goods, provided they satisfy the contract as to quality. To hold otherwise would be to lay down a hard and fast rule, which undoubtedly would work unjustly in many cases, and which would be in practice very inconvenient.

ILLEGAL LOTTERIES.

THE case of *Christison v. M'Bride* (Oct. 25, 19 S. L. R. 19) has raised the question, if question it can now be called, of the legality of lotteries. It is one of considerable public interest in connection with the ever-increasing number of bazaar and charity fairs which are held. Lord Young referred to the instructions which Crown authorities receive to put a stop to lotteries. They feel no little difficulty in doing this, and at the same time countenancing, or at all events tolerating, bazaars. A legal official is sometimes invited to open such a bazaar by a speech in which he must express every wish for the success of the proceedings to follow, while his wife or sister is perhaps busily engaged in securing tickets for a raffle, and he himself in all probability will proceed to afford active assistance. And yet upon the following day the fiscal may report that a serious breach of the law has been committed by means of some lottery.

It seems on all hands agreed that the holders of lotteries and raffles shall not in the ordinary case be punished for their offence. They are, in fact, winked at, except in some glaring case which it is feared may lead to a corruption of the public morals. Raffles for religious and charitable purposes are certainly looked upon very favourably by officers of the law. Indeed, except where there is some outburst of sectarian spite, no objection is ever raised against them. Such outbursts, however, occasionally take place. The Roman Catholics are peculiarly fond of lotteries. They are for ever attracting Protestants with the chance of winning a pony carriage and pair of ponies, offered in the interests of some "Little Sisters," or some other order of devotees. Then the keen scent of the Scottish Reformation Society is roused, and a letter from their secretary reaches the Lord Advocate, who politely answers to the effect that lotteries are distinctly illegal. But the ponies continue to be raffled for all the same. The machinery of the law seems to get out of working order when it is used for the suppression of lotteries.

The lottery in M'Bride's case was one of a kind well-known amongst the lower orders. A trotting pony was to be sold in the interests apparently not of any saintly community, but of Charles M'Bride, residing in Edinburgh. The mode adopted was by a subscription sale on the Art Union principle, or in other words, by a lottery. William Christison purchased a ticket, which proved to be the winning one, but upon application M'Bride refused to deliver up the pony. Hence an action in the Sheriff Court of Edinburgh, when the defender took the plea that as lotteries were illegal, the petition ought to be dismissed. After a proof (why evidence should have been led does not appear) the Sheriff-Substitute sustained this plea. In his interlocutor he found "(1) that lotteries are illegal and *pacta illicita*, except when expressly declared legal

by statute; (2) that the transaction on which the pursuer's claim is founded is not within any such statutory exception." Upon appeal this judgment was affirmed, although Lord Young remarked, "I do not entertain any opinion on the question whether a lottery for pictures or a pony is illegal in the sense of punishable, or that it is competent to put a stop to such by interdict as *contra bonos mores*. I know that there are various opinions on this question, and therefore in giving my opinion here against this lottery I merely give it to this extent, that an action founded on it as *medium concludendi* cannot be sustained here or in the Sheriff Court."

Lord Young does not say that such a contract is illegal under any statute, he seems to have rather gone upon the principle that the Courts of law are not intended for the disposal of disputes of such a character, but at the same time he expresses his approval of the Sheriff-Substitute's judgment. The latter founded upon 42 Geo. III. c. 119. It seems doubtful, however, whether this statute applies to Scotland. But the later Acts (6 and 7 Will. IV. c. 66, 8 and 9 Vict. c. 74) do, and would appear to render all such lotteries illegal.

The pursuer founded upon the cases of *Graham* (Feb. 5, 1848, 10 D. 646) and *Calder* (July 20, 1871, 9 Macph. 1074). The first of these cases related to a coursing match, the second to a horse-race, and they raise a nice distinction between deciding which dog or horse has won, and settling disputes concerning the prizes after the events have come off. Thus in *Graham's* case the learned judges seem clearly of opinion that they could not have decided upon Violet's claims as the winner, but she having admittedly won, they were warranted in determining who was to benefit by her success. But, as is pointed out by the Sheriff-Substitute, Christison could not set up these cases as authorities in his favour, because of the element of illegality which distinguishes a lottery from a coursing match or race. Even if the fact of his being the holder of the winning number had been admitted, the *pactum illicitum* out of which his claim arose acted as a bar to the success of his petition.

The law upon this subject of lotteries is evidently in a most unsatisfactory condition. It is doubtful whether all the benevolent ladies and gentlemen who take part in raffles are not liable to be dealt with as vagabonds. A special Act of Parliament has exempted those who take part in Art Unions from the pains and penalties to which they may have rendered themselves liable as persons "concerned in lotteries, little goes, and unlawful games." Why not exempt the promoters of charity fairs, who at present violate the law right and left, with impunity to themselves, doubtless, in so far as penalties go, but at the risk of a serious injury to their morals?

THE HOUSE OF LORDS ON THE MERCANTILE LAW AMENDMENT ACT (SECTION 1).

It is now upwards of a quarter of a century since the passing of the Mercantile Law Amendment (Scotland) Act, 1856 (19 and 20 Vict. c. 60), and it might have been supposed that after so long a period there was little room for doubt as to the meaning of any of its leading provisions. It is true that the Court of Session has usually refrained from applying the Act if the case could possibly be disposed of by the common law, and to some extent judges in the inferior Courts have had to interpret it or misinterpret it for themselves. Still it has happened occasionally that a case has absolutely required an expression of judicial opinion, and sheriffs have of course loyally followed any interpretations so furnished to them. Thus the first section, which introduces the most important amendment on the common law in regard to the rights of a buyer to goods sold but not delivered, has been the subject of interpretation in more than one case; and although the opinions of the judges of the Court of Session have not been quite harmonious, the decided preponderance of judicial opinion restricted its application to a very limited class of cases. A recent decision, however, in the House of Lords (*M'Bain v. Wallace & Co.*, July 27, 1881, 6 L. R. App. Ca. 588) seems to upset completely the commonly-received interpretation, though it will, we believe, be received with general satisfaction by the profession. As the judgment of the Court of Session in the case (which proceeded on the common law and not on the statute) was affirmed, and it scarcely appears on the face of the report that the noble Lords were superseding the interpretation that had been generally placed on this section by eminent judges in the Court of Session, it may be convenient for us to point out to our readers what meaning has hitherto been usually given to this section, and what is the more liberal interpretation now authoritatively given to it.

The occasion of the passing of the Act was of course the divergence of the laws of England and Scotland in various "matters of common occurrence in the course of trade." Of these the most important in regard to the sale of goods arose in the case of the bankruptcy of the seller before he had delivered the goods. The three first sections of the Act deal with this. In England the purchaser of goods became the owner by the mere completion of the consensual contract of sale; and if he paid or tendered the price, he could enforce delivery alike from a solvent or a bankrupt seller. In Scotland the purchaser only became owner on delivery of the goods; and though he could enforce delivery from a solvent seller, if the seller had become bankrupt he could not enforce delivery against his creditors even if he had paid the price. His only and very inadequate remedy was to rank as a creditor for the

damage he had sustained. Thus if a merchant had sold one parcel of goods to a purchaser in Scotland, and the goods were lying in Scotland ready for delivery, and another parcel to a purchaser in England, and this latter parcel was lying in England ready for delivery, and had received payment in either case, the Scottish purchaser could only rank on the seller's estate if he became bankrupt before delivery, while the English purchaser could enforce delivery of his parcel of goods. It is not surprising that such a result was felt to be inequitable; and though a stray judge of the Court of Session may be found to regard the Scottish law as the more consistent with justice, the general opinion both of lawyers and merchants favoured the assimilation of the Scottish to the English law in this respect.

The assimilation was effected by the first section of the Act, which provides that "where goods have been sold, but the same have not been delivered to the purchaser, and have been allowed to remain in the custody of the seller, it shall not be competent for any creditor of such seller after the date of such sale to attach such goods as belonging to the seller by any diligence or process of law, including sequestration, to the effect of preventing the purchaser or others in his right from enforcing delivery of the same; and the right of the purchaser to demand delivery of such goods shall, from and after the date of such sale, be attachable by, or transferable to, the creditors of the purchaser." It might have been supposed that this section is sufficiently broad in its terms to cover every case of real sale of a specific article remaining undelivered in the hands of the seller, though doubtless in exceptional cases where the seller had been allowed to remain in possession of the article *mala fide*, and with the effect of deceiving third parties, the purchaser might be barred from maintaining his right to delivery. But a much narrower interpretation has been generally given to the words of the statute, as will be seen from the following cases.

In *Sim v. Grant* (June 3, 1862, 24 D. 1033) the question was as to the application of the statute in the case of a mare which the seller had bound himself in writing to deliver at any time when required. The Court were of opinion that the full use of the mare and the power to sell her, so long as undelivered, had by arrangement been left with the seller, and it is not surprising that they refused to apply the Act to a case where they did not think there had been a real sale at all. But their opinions as to the meaning of the section of the statute show that they considered its application limited to the case of goods left with the seller for the mere purpose of custody. Lord Cowan says, "The statute provides for the case of the custody remaining with the seller—meaning that custody for the safety and preservation of the thing sold which the seller behoves to have when the delivery is not intended to be immediate, and some time elapses between the sale and the actual

transference of the *corpus* of the thing sold." And Lord Neaves says, "I think the Legislature must be taken to have meant the provision to apply only to a case of proper sale and proper custody." The Lord Justice-Clerk (Inglis) substantially expresses the same view, though he and Lord Benholme rest their opinion more on "custody," as excluding beneficial use and enjoyment, and the former also on the state of possession disclosed in the case being inconsistent with a personal contract of sale. A similar opinion will be found expressed by Lord Deas in *Edmond v. Mowat* (7 M. 59).

If the section applies only to the case where the article sold is left with the seller for mere custody, manifestly it has no application in the case of an article left with the seller for some further operation to be performed on it, or an article purchased in an unfinished state and left with the maker for completion. In *Wylie & Lochhead v. Mitchell* (Feb. 17, 1870, 8 M. 552) a coachbuilder contracted to build a hearse for an undertaker, the latter binding himself to furnish certain portions of the materials. The undertaker performed his part, and after the incorporation of the material furnished by him, but before the hearse had been completely finished, the coachbuilder became bankrupt. The undertaker attempted to enforce delivery. The case was disposed of at common law with a most elaborate judgment on the principles of common property, *specificatio*, joint production, industrial accession, and the like; but neither judges nor counsel seem to have considered the Act applicable. Lord Kinloch says, "The enactment applies only to the case where the article has been ready for delivery and left with the seller for mere custody, and is inapplicable to the case of an unfinished article remaining with the seller for the purpose of being completed."

But in *Orr's Trustee v. Tullis* (July 2, 1870, 8 M. 936) Lord Justice-Clerk Moncreiff expresses his opinion in favour of a much more liberal interpretation, and this opinion has now in effect been indorsed by the House of Lords, though it has been unsupported in the Court of Session. The proprietor of premises let as a printing office bought the plant and types from his tenant, and granted him a new lease of the premises with the use of the plant and types. After some years the tenant was sequestrated, and his trustee claimed the plant, etc. It was held that at common law there had been delivery, the proprietor being in possession through his tenant. But on the alternative view that there had been no delivery the Lord Justice-Clerk thought the Act applied: "There are only two conditions necessary to introduce the remedy of the statute—(1) a completed contract of sale; (2) that the subject sold has been allowed to remain in the custody of the seller. In every case in which these two conditions unite the statute applies. In this case there was a completed contract of sale; and if the goods were not delivered, they were allowed to remain in the custody of the seller. I think the *dicta* in the case of *Sim* have been entirely misappre-

hended." But though Lord Neaves hesitated as to whether the Act might not apply, Lord Cowan evidently maintained his former views. Lord Gifford, who was Lord Ordinary in the case, thought the statute inapplicable.

The last case in which the statute has been construed is the case of *M'Meekin v. Ross* (Nov. 22, 1876, 4 Ret. 154). A shipbuilder had sold the scrap iron lying in his yard and the scrap iron which should be produced during a certain period. It was held that the purchaser could not enforce delivery after the seller's sequestration. Lord President Inglis says, "The question is, Is that a sale in the sense of the first section of the Mercantile Law Amendment Act? I am of opinion it is not. In the first place, the subject is not a specific *corpus*, and therefore in purchasing the pursuer acquired no *jus ad rem specificam*. In the second place, it is plain that the delay in delivery arose from the nature of the contract itself, and did not accidentally arise from any carelessness or want of precaution." And after quoting sec. 1, he proceeds, "That is the only case where this Act applies, and what is contemplated there is a present sale in the ordinary sense whereby the seller is under an immediate and present obligation to deliver a specific *corpus*. The buyer, on the other hand, is under an obligation to pay an ascertained price while the goods are allowed to remain, or happen to remain, in the custody of the seller contrary to the spirit of the contract, which contemplates immediate delivery. Any other construction of the clause would lead to strange consequences."

So stood the judicial interpretation of the section till the case of *M'Bain v. Wallace & Co.* above referred to. It is certainly curious that an authoritative interpretation by the House of Lords has at length been elicited in a case relating to the only article of commerce that was generally believed to have no occasion to call in the Mercantile Law Amendment Act to supplement non-delivery. Why an unfinished ship in the hands of the builder could be sold to the effect of completely vesting the purchaser in the property without delivery, and an unfinished carriage or hearse probably could not, is now a question, as Lord Watson says, of only antiquarian interest, though it was very far from being so before this case of *M'Bain v. Wallace & Co.* But such was the generally-received doctrine in the matter. The facts of the case are these. Wallace & Co. had agreed to make advances to Roney, a shipbuilder (represented in the case by his trustee M'Bain), on the security of a ship nearly completed, provided Roney would enter into an absolute contract of sale of the vessel. A contract of sale was accordingly executed in writing, by which Roney agreed to complete and deliver to Wallace & Co. the vessel for a price to be paid in two instalments, with power to Wallace & Co., in the event of Roney failing to complete the vessel, to enter into possession of the vessel and complete it or sell it. The price was paid, but

Roney was sequestered before the vessel was finished or delivered. There was an attempt on the part of Roney's trustee to show that Roney had been allowed so to deal with the vessel after the sale as to create a reputed ownership in him; but in this, in the opinion of the Court, he failed. The Second Division of the Court of Session (Jan. 7, 1881, 8 Ret. 360) disposed of the case solely on the common law, considering that since the case of *Simpson v. Duncanson* (Mor. 14204) there was no doubt that the transference of the property of a ship in the course of being built was an exception to the general rule requiring delivery in order to pass the property upon a sale. The statute does not seem to have been referred to. In the House of Lords Roney's trustee endeavoured, not without success, to shake the authority of *Simpson v. Duncanson*, and maintained that the statute could not be applied, (1) because there was no contract of sale in reality, but merely a security arrangement; (2) that sec. 1 only applied to a real sale of a specific article ready for delivery and completed; and (3) that it did not apply where the goods are left in the seller's custody at his order and disposition. But the House held that though security for money was the object of the sale, yet there was a *bond fide* sale in fact and intent, unaccompanied by delivery, and so that every condition of the statute was fulfilled. Lord Chancellor Selborne says, "The statute does not say that there being a sale, that is to be taken out of the operation of the statute, because the parties have some further contract, or agreement, or understanding *inter se* with regard to the subject of the sale." Lord Blackburn's opinion deserves most careful perusal, coming as it does from one almost equally well acquainted with the theories of the civil, the English, and the Scottish laws regarding sale. We are afraid he expresses the real cause of the vacillating, and frequently erroneous, interpretations of the statute by Scottish judges when he says, "It is almost as important in construing that Act to know what was the English law as to know what was the Scotch law." His Lordship, after explaining the general principles of the law of either country, proceeds to refer to the meaning of the words "allowed to remain in the custody of the seller." He says, "An attempt has been made to give a meaning to those words in which I cannot agree. I think that when you take the existing law of England and Scotland, as I have mentioned, and see what was the object of the Legislature in using these words, it is plain they could not have intended by such words to introduce a new and complicated difference between the law of England and the law of Scotland." The only qualification of the absolute right of the purchaser to enforce delivery recognised by his Lordship seems to be, "If you can show that the man who had acquired the *jus ad rem* has allowed the vendor to keep possession of the goods in such a way as is quite inconsistent with the *jus ad rem*, it seems very reasonable indeed to say that that shall be considered as analogous to a case of reputed ownership, and that being so, the Mercantile Law (Scotland) Amend-

ment Act does not take the goods out of it. It says that delivery shall be good to make a contract of sale pass the property as against creditors, but it does not say that without delivery the property shall pass, where if there had been delivery, and the goods had been left in this particular way with the vendor afterwards, they would have been made liable to the diligence of his creditors." Lord Watson puts the question on a very clear footing: "The Legislature did not enact that in Scotland the completion of a personal contract should pass the property or have the effect of delivery; but it did enact by the first section of the statute of 1856 that, as in a question with the creditors of the seller, or with the trustee in the sequestration of the seller, the purchaser under a personal contract of sale should have precisely the same right to enforce delivery of the goods sold as he would have had against the bankrupt had he remained solvent." His Lordship quite recognises the same possible qualification as that pointed at by Lord Blackburn, where the seller has been allowed to retain the goods and deal with them as his own.

Better late than never, but twenty-five years is a long time to wait to find out the meaning of a leading clause in a statute intended to remedy a clamant grievance arising in everyday transactions. And it is a little unsatisfactory for a Scottish lawyer to find that, to use Lord Blackburn's words, it is almost as important in construing the Act to know what is the English law as to know what is the Scottish common law in the matter. It is also somewhat mortifying to observe that the simplest way of construing the disputed words as to the goods "having been allowed to remain in the custody of the seller" is to treat them *pro non scriptis*, as the noble Lords do in effect, though not in words. The words, occurring as they do in an Act applicable to Scotland, are perhaps not mere surplusage, for a clause dealing with "goods sold, but not delivered," might possibly have been read in Scotland, though not in England, as including not merely sales of specific goods, but sales of goods contracted to be furnished. Apparently the words in question were introduced simply to confine more clearly the application of the clause to proper sales of specific goods, including, of course, cases in which the subject of the sale, though not specific at the time of the sale, has been subsequently made specific, *e.g.* by separation from a mass, weighing, measuring, etc.; in other words, to cases where there was *emptio perfecta*, *i.e.* a personal contract of sale complete in every respect, even to the passing of the risk.

It certainly will not be possible for the future to disregard English decisions as to what contracts are "bargains and sales," which have the effect of passing the property and the risk to the buyer, and what are merely executory agreements, leaving property and risk with the seller; for it is manifest that the House of Lords will apply the section of the Act to all cases where the property in the goods sold would pass to the buyer, according to the law of

England. But the Scottish lawyer will arrive at the same result if he will consider the section applicable to all cases where the risk, according to our law, has passed to the purchaser, or, which is the same thing, where the *jus ad rem specificam* has passed to him, or there is *emptio perfecta*, in the language of the civilians. A "bargain and sale" in the English law, we may explain, is, to use the words of Lord Blackburn, "a contract for good and valuable consideration to pass the property in particular chattels," and corresponds to the *emptio perfecta* of the civil law. Scottish lawyers will find much valuable law on what amounts to *emptio perfecta* (i.e. a complete personal contract of sale operating a transfer of risk to the purchaser) in *Hansen v. Craig* (Feb. 4, 1859, 21 D. 432).

Dismissing from consideration exceptional cases in which the purchaser may be barred from enforcing his right to goods undelivered, by having allowed the seller collusively to retain possession of them so as to mislead his creditors, on the principles applied in cases of reputed ownership, the application of the section as settled by this decision of the House of Lords is unlimited. It applies to every case of goods sold and not delivered where the risk has been transferred to the purchaser. Or in other words, it applies to every case where there is a complete personal contract of sale, vesting the purchaser with the *jus ad rem specificam*. It is quite immaterial from what motive the sale has been made, whether to secure advances or not. And it is just as immaterial from what cause delivery has been delayed. The cause may be carelessness, or accident, or because the subject is not in a state suitable for immediate delivery, or because delay suits the purchaser or seller, and that whether it have been stipulated in the contract or not. It may be that the article is in an unfinished state, and left with the seller to finish, or it may be even that it has been left with him for his beneficial use, provided the parties keep clear of "reputed ownership." The application of the section is universal if the purchaser have really acquired the *jus ad rem specificam*. This latter question is of course often one of great nicety, depending on the particular contract, and also on the general rules of law. It must not be supposed that because the House of Lords have found that in *M'Bain v. Wallace & Co.* the purchaser had right to enforce delivery of an unfinished vessel lying with the shipbuilder for completion, that as a general rule the purchaser of a ship, or a carriage, or even of a hearse in course of building, has acquired a *jus ad rem specificam*. The presumption is to the contrary in England, and in Scotland it is a doubtful point, though in the case of an unfinished ship, up to this present decision in the House of Lords, it was believed that not merely the *jus ad rem*, but the actual property passed to the purchaser where the price or the instalments of the price had been duly paid. The same presumption against the *jus ad rem* passing to the purchaser applies where the vendor has to do something to the articles to put them into a deliverable

state, and in many other familiar cases, but the intention of the contract, if clear, will override all presumptions. The terms of the deed of sale in *M'Bain v. Wallace & Co.* made the intention clear. In the peculiar circumstances of the case of the hearse above referred to (*Wylie & Lochhead v. Mitchell*), the undertaker having contributed the most expensive part of the material which had been incorporated by the coachbuilder in the hearse built by him, it seems difficult to think that the parties did not intend the undertaker to have the *jus ad rem specificam* as soon as his materials were made use of.

By this decision our Courts will be relieved for the future from many ingenious, if not always ingenuous arguments, and we must add judgments, on the question of constructive delivery. If the goods are delivered, *cadit questio*; if they are not, the section of the Act settles the case. The sense of injustice done to the buyer in being deprived of goods for which he had paid led our Courts early in the century to discover constructive delivery in very doubtful circumstances. The wish was father to the thought. Shipowners found protection in *Simpson v. Duncanson*; and though other trades had not attained to so sure a footing, they could find most respectable authority for pleading the necessity of the case. Thus Mr. Bell, after instancing several cases of supposed constructive delivery, some of which at least have been negatived in decisions since his time, proceeds (Bell's Com. i. p. 176): "There is another case of necessity which seems to give sanction to constructive delivery, viz. where goods are purchased from a manufacturer before some necessary operation of his art is completed. Contracts of this kind are frequent. A person buys a ship on the stocks, or a piece of cloth at the printfield, or a vase in the hands of a goldsmith unfinished; or a merchant, having an order from abroad for cotton goods, goes round among the manufacturers and buys all the cloth on their looms in a state of preparation. Actual change of the possession is, generally speaking, impracticable; but if the accidental bankruptcy of these manufacturers were to entitle their creditors to seize the goods, and there were no means of securing the property to the buyer, ruin might, in extensive speculations, ensue to the foreign merchant and his factor. Where in such cases the evidence of the contract is clear, where the subject purchased is specific, and where there is no ground for pleading on the effect of reputed ownership as giving additional credit to the holder of the goods, there is a constructive tradition sufficient to transfer the property, the price being paid." Mr. Bell states the law on such matters as it was generally felt that it ought to be, but whether that was really the law is much disputed. But it is certainly now law that the buyer in such circumstances can enforce his right to his purchase under the statute, though we have been long in discovering it.

Correspondence.

(To the Editor of the "*Journal of Jurisprudence*.")

ATTORNEYS, ETC., CERTIFICATES.

SIR,—The writer hereof, a residenter of Glasgow, on applying at the Stamp Office there for the *first time* for an attorney certificate, was asked to pay £6 because of being "an enrolled law agent" for upwards of three years. Perhaps you will, or allow some reader to, explain, through the medium of the *Journal*, if the fact of *enrolment only*, without "practising" or "carrying on business," justifies this demand. The sections of the Acts of Parliament bearing on the subject of annual certificates will be found in the "Parliament House Book," "The Edinburgh Almanac," "Scottish Law List," etc. The annual licence duty is a grievous and oppressive inflection of a goodly number of deserving practitioners, the emoluments of whose business have been greatly diminished by the many recent changes in the law and practice of the Court, as well as in conveyancing. As an exclusive right to practise is conferred on members of the bar and on doctors without being subjected to an annual licence duty, these, then, are two cogent reasons why law agents should be relieved from the payment of the existing yearly licence. A bill might be brought before Parliament the ensuing session for the abolition, on behalf of law agents *only* (notaries ought to pay until compelled to design themselves as such), from payment of the annual tax.—I am, etc.

H. G.

December 20, 1881.

SUGGESTED IMPROVEMENTS OF TITLES TO LAND.

SIR,—In your *Journal* for January 1880 I called attention to what I considered a desirable simplification in form and substantial improvement of the process of infestment; and I now desire to call attention also to the simplification of deeds of conveyance of heritable property, the diminution of the risks connected with them as titles, and the disposal of the refractory residue of risk which, more or less, will escape elimination, notwithstanding the best-laid plans. I take the present to be a good opportunity for throwing any light I can on these subjects, because these, with cognate matters, seem likely soon to become subjects of legislation.

I pass over at present the proposal which has been made to have absolute titles registered, as being probably beyond practical realization at present, not only because an unsuccessful attempt has recently been made in England to introduce that system into

practice, but because it, at least in principle, admits the possibility of laying the residue of risk, incapable of elimination, on the shoulders of individuals, conceivably in circumstances of great and poignant hardship, a defect in principle which it will require great and well-established advantages to sufficiently atone for.

The essential matters to be specified in every conveyance of a heritable right are—(1) The grantor and grantee; (2) the heritable right conveyed; (3) the act of conveyance; and (4) the attestation.

With regard to the grantor and grantee, limited and conditional ownership—on which there has lately been so much interesting discussion respecting its effects in obstructing the fulfilment of the proprietor's natural duties, during his possession, to his tenants and the public—has also complicated conveyancing considerably. One of the most patent inconsistencies of feudal conveyancing is that, while it absolutely requires the public investiture of some person as proprietor, with the view, presumably, of avoiding uncertainty as to the ownership, yet it suffers his right to be encumbered, under the form of trusts and otherwise, with such conditions—of the fulfilment of which it does not prescribe any absolute, or even necessarily good, method of ascertainment—that the property, notwithstanding the formal investiture, may in many cases be more truly said to be devoted to an abstract purpose than to be vested in a proprietor, and the title to convey may in some cases be almost as difficult to ascertain as if there were no written title at all. So far as limited or conditional ownership is to be retained, some absolute mode of ascertainment of the fulfilment of any conditions desired to be attached to conveying should be provided, so that in this, as in other respects, a title, properly so called, and not merely a capability of ascertainment, may always exist. The object aimed at by the above rule of feudal conveyancing would then really be attained in practice. This might be done by requiring every conveyance to nominate the grantee either alone or conjoined with some other person, judge, or official, to be chosen by the grantor, as parties whose concurrence would be required in every conveyance, and whose concurrence would make the conveyance absolutely good to every person not positively acting fraudulently, or at least to every onerous grantee; and preserving any conditions that may be desired to be attached to conveying only in the form of a personal request to such conjoined parties. Although a mistake by them might cause a right to be erroneously conveyed away beyond recall, yet, if the person constituting the conditional title were at liberty to make choice of a judge, or other trusty and skilled person, to decide when the conditions of conveying have been fulfilled, and if his own nominee should err, that fact would simply be proof that his constituent had attempted to attach conditions too indefinite, or of too difficult ascertainment, and he might justly be required to impute such a mishap to his own error in attempting to attach

such conditions to marketable property; and such conditions do not deserve, at the public inconvenience and risk, any further sanction than this. That consideration would take the sting out of any such supposed hardship, differently from the conceivable results of adopting a complete system of absolute titles. In cases where strict observance of such conditions might be deemed of importance, a judge *ex officio*, either alone or with trusty friends, might be allowed to be nominated, and the process of satisfying such judge of the fulfilment of such conditions might probably in most cases be made to cause no more trouble and expense than service of an heir; and this would, in cases of importance, be a trifling burden. Of course any such nominee should be obliged to concur, even against his own opinion, or his concurrence should be superseded, if the supreme Courts should declare the conditions of conveying to have been fulfilled, a proceeding which should rarely be necessary.

The description of the heritable right conveyed is a department in which considerable skill might often be usefully applied; yet, as a general rule, less completeness and system have been displayed in this than in many other purely formal or subordinate parts. In the simple case of conveyance of the absolute right to land or house property, as much attention should often be paid to a skilful survey as to correct conveyancing. Of course the description of limited and conditional rights (to such extent and to such effects as they are to be retained) will always be proper subjects for exact conveyancing skill and experience. Although this letter refers more specially to the forms of expression of conveyances than to what is usually left to implication, such as the conditions of the feu, yet it may be in furtherance of its general object to remark here that, if legislation is to prevent the proprietor from reaping the fruit of the tenant's labour, it should also prevent the superior from reaping the fruit of the proprietor's labour in untaxed casualties. The principle on which these are computed is radically iniquitous, notwithstanding all that can be said in their favour as based on old bargains between predecessors in the property; and their incidence is most harassing. Recent legislation has in some respects intensified this evil, and has necessitated, for the avoidance of the too frequent incurrence of such casualties, a manipulation of titles more complicated than before, and having no more relation to equity than gambling has. It is hopeless to attempt to cure such an evil by any feebler agency than the total abolition of such casualties, subject to compensation, to be estimated with as much equity as circumstances in each case permit; and I hardly think recent legislation in this direction can have been intended to be more than experimental.

The words of conveyance are now primitively simple, so far as concerns the main right conveyed, but it is wrong to require to be expressed what could be much more appropriately implied, as to

the assignation of rents subsequent, and the relief of burdens prior, to the term of entry, and the assignation of writs, in its feudal sense of the right to make use of the grants made in these writs, in favour of the grantor, of what he has already conveyed over. All these rights are clearly comprised in the main right conveyed, and to require their separate expression is at least useless. It is objectionable that the preservation, for long periods of time, of the writs themselves, often relating to several properties or interests, should be intrusted to such uncertain custody as the continued care not merely of a particular agent or other person, but of his unknown successors, and probably, if the public were fully alive to the risks involved in the loss of writs, they would not tolerate this practice. It might be provided that at infetment the writs founded on should either be recorded for preservation, or else that executed duplicates should be lodged at the register, to be made accessible, not necessarily to every one, but at least to any one showing an interest in the subjects, in case of necessity. One or other of these alternative methods could always be adopted without serious inconvenience, and this would make the present admirable system of registration for preservation beneficial to its fullest capacity. This would also enable us to dispense with the formal inventory of writs and relative stipulations, unless in exceptional cases.

There is very little risk now connected with the attestation of a conveyance. Such risk as remains may arise from forgery, vitiation, force, fear, or other *vis major* employed against the grantor or his predecessors. These risks might be practically extinguished by insurance, which might appropriately be undertaken by Government, and which, with such simple precautions, at the places of execution, as Government could conveniently adopt, ought to be attainable at very small cost, and probably with less total expenditure for losses in proportion to its efficiency than much that is done under the head of defending the land from foreign enemies. Indeed, the pecuniary loss that might arise from every risk not capable of elimination by suitable improvements might probably be reasonably undertaken in this way by Government. In that case there would be achieved a system of absolute titles to the value of the subjects of conveyance, though not to the specific subjects. That would so much diminish in degree the possible hardships connected with such risks as almost to equal in advantages a complete system of absolute titles, while avoiding the risk of the peculiar hardship to individuals, which is the characteristic disadvantage of the latter system.

Although improvements of the kind which I have suggested in these letters do not at first sight appear to proceed on broad rules of equity like those which are to be the grounds of approaching legislation on the ownership and occupation of land, and so are apt to be allowed only a secondary place in the attention of legislators, yet it ought not to escape notice that they are indirectly of con-

siderable importance to equity and morality, and that they should consequently be carried into effect for other reasons besides immediate material advantages in the practice of conveyancing. The superfluous technicalities under which conveyancers for long laboured, and from which they have not yet been entirely freed, have had a tendency, in proportion to their abundance, to degrade conveyancing, assimilating it more or less to card-sharping, and tending to make the chief accomplishment of conveyancers consist in an adroit manipulation of papers and forms, the object of which might be defined as the securing to their respective clients all their own *at least*. Such an occupation not only has a tendency to blunt their moral perceptions, and to infringe on their leisure for culture generally, but it diverts their attention from the proper studies of their profession. The true science of the conveyancer consists in a knowledge, for the purpose of enabling him to assist in the deliberations of his clients, of the various family and social relations, the natural, equitable, and legal claims and duties arising therefrom, and all their varying relations to, and effects on, the various rights of property, whether such claims and duties be positively sanctioned by law, or merely call for conventional sanction, in special circumstances, by the conveyancer's advice and his client's approval, by will, marriage contract, deed of copartnery, or other deed regulating such relations; and the conveyancer's true art consists in adjusting—not merely in conformity with the ritual of law, but by developing completely, for the consideration of his client, in such a manner as only an experienced and systematic conveyancer can, the rough-cast intentions of his client, who is often inexperienced in such schemes—suitable provisions for satisfying all such claims and duties, so as to enable his clients to secure, besides immediate material advantages, justice and humanity for themselves, their families and connections, in all possible circumstances. These studies involve the most important results, and often the dearest wishes and most anxious cares of their clients, yet they have often been treated in a comparatively desultory manner. They really deserve and require the conscientious and undivided application of the legal adviser's heart and head, and to this all useless ritual is obstructive and even antagonistic. No doubt lucid expression, in the normal language of conveyancing, is also desirable, but an exhaustive knowledge of these subjects will lead to this, so far as really necessary, without any such ritual as I have referred to. Although conveyancing cannot boast of being, in its material forms of expression, a fine art, yet, even in such material forms, it may become a pure art; and its best ends, viewed as to their bearing on equity, morality, and humanity, and beside purely material considerations, cannot be ranked lower than those of the fine arts; and if the methods of conveyancing were purified from every vestige of useless ritual which might, justly or unjustly, raise suspicions of sordid or exclusive motives, the handiwork of

the conveyancer might be made to bear evidence, as unmistakably to the understanding of the public, if less vividly to their senses, as that of the followers of other arts, that the conveyancing profession were, as much as those, dominated by a single-minded sympathy with, and devotion to, humanity, justice, and morality; and conveyancers might, in their labours for their clients, earn and receive their fair share of public sympathy, which I do not think they generally do at present. No error more hurtful to the prospects of the profession could be made by those who have no clear perception of its higher aims than to suppose that simplification of forms will necessarily lower the acquirements and status of conveyancers. On the contrary, a purer art will deserve deeper and more systematic study, and will attract, on an average, a better class of men; and if conveyancing do not, in the spirit and light of the age, keep pace with other arts and sciences in making as near an approach as possible to perfection, even the current of talent and integrity which has hitherto flowed into the profession may be diverted to other arts and sciences, the pathways of which have been greatly multiplied since the good old times of dusty sasine-givers.

I hope, therefore, that on these broad principles, approaching legislation will not stop short at simplifying and improving conveyancing after the manner I have suggested in these letters, so far merely as these improvements may be of immediate material advantage in practical conveyancing, but will eliminate conscientiously every trace of useless ritual.

SIMPLEX.

Reviews.

Treatise on Master and Servant, Employer and Workman, and Master and Apprentice, according to the Law of Scotland. By PATRICK FRASER, one of the Senators of the College of Justice. Third edition, by WILLIAM CAMPBELL, Advocate. Edinburgh: T. & T. Clark. 1882.

THE fame of the writer of this book as an authority upon all points connected with the personal and domestic relations is too well known to be alluded to in these pages at any length. The appearance of the third edition of his valuable work on the law of Master and Servant will be received with much appreciation by the entire profession. Nine years have elapsed since the publication of the last edition, and since then the changes in the law have been so great that, as the present editor says in his preface, "one-half of the text of that edition is now obsolete, and many of the styles of procedure upon which Lord Fraser expended a large amount of care are no longer applicable to the existing state of the law." No less

than thirteen Acts connected with the subjects treated of in this volume have been passed since 1872; some of these, such as the Employers Liability Act, and the Summary Jurisdiction Acts of last session, making important changes in the law. We may state at once that the treatment of these by Mr. Campbell is in the highest degree satisfactory, and gives a special value to this edition. As regards the most important portions of new matter, we may state that chapter xi. is devoted to a commentary on the Employers Liability Act, and is an exhaustive and able statement of the law as laid down by that statute: the effect of the Act where it applies is first considered, and under this head the question arises whether a claim exists if the death of the servant is not caused by the injury. Supposing a servant dies from some other cause than the injury during the dependence of the action, it is thought that the executors would not be entitled to sist themselves as pursuers. The causes of action under the Act are next dealt with at considerable length; the questions arising under this head are numerous and often difficult: they are, however, discussed in a way which leaves nothing to be desired on the ground of fulness and careful investigation. The classes of workmen entitled to claim the benefit of the Act are next specified, and this is followed by the amount of compensation recoverable under the Act. The next section treats of the notice of Injury and Limitation of actions under the Act, the chapter concluding with a discussion on the procedure; and on turning to the end of the volume we find the necessary forms of a petition in the Sheriff Court, and of notice of injury to a workman. An interesting and important point is discussed in chapter x. as to whether a "workman" is entitled to disregard the statute, and to bring his action at common law if he conceive it for his interest to do so. The opinion is expressed that if the rule of *collaborateur* "were inapplicable to the circumstances of the case, as where the cause of injury is the fault of the master personally, it would be more for the workman's interest to bring his action at common law in the Court of Session than in the Sheriff Court, whereby he would not be limited as to the amount of damages he could claim, nor as to the time within which his action must be brought, and he could, moreover, have what has always been considered advantageous for such a pursuer, viz. a trial by jury." The point here raised is an important one, and one which does not seem to have been in the view of the Legislature when the Employers Liability Act was prepared; but it is one which will have to be carefully considered by any one whose duty it may be to advise clients who are desirous of suing for damages.

The chapter upon Trade-Unions gives an interesting notice of the progress of the law relating to such associations from the time when they were considered as wholly illegal bodies down to the passing of the Trade-Unions Amendment Act, 1876. It might perhaps have been expedient to have given the regulations issued by the Home

Secretary in greater detail than has been done, or the regulations themselves might have been printed *in extenso* in the appendix; but this is a point of slight importance, and the appendix is so large already that the editor may be well excused from inserting anything that could possibly be omitted. It may be stated in explanation of the lines on which the work is constructed, that as a general rule an abridgment of the Act is given in the text and there commented upon. In some cases, however, such as the Factories and Workshops Acts, the text is printed *verbatim* in the appendix, and the commentary thereon given in the form of notes. Although this method has certain drawbacks, the advantages obtained by it probably outweigh these, and with the help of the excellent index supplied no one should have the slightest difficulty in turning up the exact subject he wishes.

The references have been brought down to date, which is an additional proof of the industry and care of the editor. Many English and American cases are quoted, full quotations from the opinions of the judges being given, so that the practitioner, even though he may not have the necessary books of reference beside him, should never be at a loss in ascertaining what were the exact grounds of the decision. In consequence of much pressure on our space we are compelled to leave unsaid much that might have been urged in commendation of this book. Practically, however, this does not much matter, as no lawyer who has occasion to go into the subject can possibly be without Lord Fraser's exhaustive and scholarly work. Mr. Campbell is to be congratulated on the careful manner in which he has performed the task of bringing out this edition, which will, we hope, be the standard work on the law of Master and Servant for a long time.

Principles of Contract. By FREDERICK POLLOCK, LL.D., of Lincoln's Inn, Barrister-at-Law. Stevens & Sons. 1881.

LET us suppose a practitioner of Scottish law, with access to a well-furnished library, finding himself face to face with some delicate question in contract law. He looks in vain to Bell's Commentaries, which, even as annotated, are apt to give no sound at all, or at best an uncertain one; Brodie on Sale is antiquated; Paton on Stoppage *in transitu* was never anything better than a pot-boiler; and Mr. Campbell in his recent lectures gives little more than a peep of the mysteries to the profane lay vulgar. In spite of ominous warnings that he is treading on ground full of such pitfalls as case, detinue, trover, assumpsit, and consideration, and that he may find himself tripped up any moment by purely Teutonic notions on sale and partnership, the starveling Scot hies him to the English side of his book-shelves, only to find himself exposed to the opposite peril of a surfeit. If in the habitual artisan spirit of the overwrought lawyer he desires to find a tool ready familiar with the work in hand, he will probably turn to

Leake's Digest, or to Parson's three large volumes. If the *species facti* plainly pertains to some one of the better-known contracts, he may appeal to monographs, of which the name is legion; or he may find the law relating to a great number of special contracts bound up tightly in handy parcels by Chitty, or Smith, or Addison, or their continuators. Or, being a Quaker in jurisprudence, he may get nearer the source of truth by consulting the reported *responsa Jctorum*, as collected in Langdell, or as collected and annotated in Smith's Leading Cases. And yet in the end he may find it well to finish off where he ought to have begun—at the treatises which best set out the *generalia* of contracts, by analyzing the principles upon which the law of contracts rests, without any detail of the application of these principles in special forms of contract. These are Anson and Pollock. We do not profess to be in a position to compare or contrast these two, but the new Provost of Oriel doubtless deserves his rival's emphatic eulogy for having written "not only the best elementary book on its own subject, but the best elementary book yet in existence on any topic of English law." Of Mr. Pollock's book it may be sufficient to say that it is in method, style, and matter a model law-book, and that no English law-book has been so often consulted by Scottish lawyers in recent years as this.

The English writer of a law-book who does his work well has in a sort his reward; but it is not every author, however efficient, who can congratulate himself on getting into a third edition in little more than five years. The half-whimsical grumble with which we greeted the first edition (*Journal of Jurisprudence*, 1876; vol. xx. p. 264) has not been indorsed by the public, and Mr. Pollock, we do not doubt, owes his Edinburgh doctorate of law as much to the acknowledged worth of this book as to his Digest of the Law of Partnership and his treatise on Spinoza.

The method of the work is a compromise between an illustrated code and the ordinary law treatise, which strings rubrics together under more or less apposite headings by aid of the particles "and," "but," "again," "where," "moreover." The system of codification he had already adopted, in imitation of the Indian Evidence Act and Justice Stephen's labours on the Criminal Law, in the treatise on Partnership, which has just been alluded to. The main defect of the method in a book clothed with no extrinsic authority is the air of dead-sureness which pervades every page. Any doubt, even any adverse speculation, though it be hidden away in an illustration, is a flaw in the texture of such a piece of work. This may be almost entirely avoided in some well-defined fragments of our legal system, such as bills of exchange, partnership, or crime. But the anomalies of English contract law, which have been recently traced to their home on the Elbe by Mr. O. W. Holmes, have kept and are keeping this department of English jurisprudence in a state of unstable equilibrium, which will not, as we think, be cured so long as Mr. Pollock and his rival authors look for counsel across the

Channel to France, and across the "great dampness" to America, rather than across the Cheviots. In more than one sense Scotland seems to them a land of no consideration, and therefore not worth the regarding. Yet it has happened that the big brother has learned from the little one, and it may happen again, and in this very department of mercantile law.

It would be out of the question to attempt a detailed criticism of an established favourite. We have found it possible—as happens with so few text-books—to read the volume from beginning to end with pleasure and profit. Perhaps the chapters on Mistake and Fraud contain the most interesting pages. They contain, also, one of the few passages in which the author confesses to a change of view. The question is whether, in equity (and therefore now all over the English Courts), representations may have to be "made good" which do not amount to contract. It seems to have been generally believed that they might be so enforced, and the belief was rendered plausible by the ambiguities of Lord Eldon, the rashness of Lord Cranworth, and the obsequiousness of certain Vice-Chancellors. The cases in which the question has mainly arisen have turned on the validity of promises to make a provision by will, or of promises on the faith of which marriages have been contracted. The anomaly was obvious enough, and even a Chancery leader's subtilty found difficulty in justifying the enforcement of a promise which was no promise, for the sole reason that an over-trustful relative caught up the hint and acted on it. Last year the question arose very purely in a case which came before Justice Stephen, who delivered an elaborate judgment, which is approved by Mr. Pollock after a reconsideration of the whole authorities. The plaintiff, as heir-at-law of an intestate, claimed the title-deeds of the intestate's farm, of which the defendant had taken possession on his death. The defendant counter-claimed a declaration that she was entitled to a life-estate in the farm, and to retain the title-deeds for her life. The jury found that the defendant was induced to serve the intestate as his housekeeper without wages for many years, and to give up other prospects of establishment in life, by his promise to make a will leaving her a life-estate in the farm, if and when it became his property. The learned judge, while holding the verdict as affirming a contract, based on good consideration and binding on the estate, stated what he took to be the law on the matter in the following words: "The law on the subject is, I think, clear and consistent when all the decisions are considered, but I am led to believe that an impression exists that there may be such a thing as a representation, which though neither a contract nor part of a contract, may have the effect of binding the person who makes it as if it were a contract. I do not agree with this view, and I think it desirable to state fully the way in which the matter presents itself to me. It seems to me that every representation, false when made or falsified by the event, must operate in one of three ways if it is to produce any legal consequences. First, it

may be a term in a contract, in which case its falsity will, according to circumstances, either render the contract voidable or render the person making the representation liable either to damages or to a decree that he or his representatives shall give effect to the representation. Secondly, it may operate as an estoppel, preventing the person making the representation from denying its truth, as against persons whose conduct has been influenced by it. Thirdly, it may amount to a criminal offence. The common case of a warranty is an instance of a representation making part of a contract. *Pickard v. Sears* (6 A. and E. 469) and many other well-known cases are instances of representations amounting to an estoppel. A false pretence by which money is obtained is an instance of a representation amounting to a crime. Besides these there is a class of false representations which have no legal effect. These are cases in which a person excites expectations which he does not fulfil, as, for instance, where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences unless the person making the representation not only excites an expectation that it will be fulfilled, but legally binds himself to fulfil it, in which case he must, as it seems to me, contract to fulfil it." The main facts in the case were that the intestate had made the promise long before his death, on which the defendant acted; and that he had signed a will carrying out this promise before two witnesses, but, unluckily for its validity, not before them together. The judgment of Justice Stephen supporting the contract was reversed by the Court of Appeal, but on a ground which did not touch the doctrines laid down in the Court below (*Alderson v. Maddison* (1880), 5 Exch. D. 293, revd. (1881) 1 Q. B. D. 174).

We have no space for anything more than a reference to the chapter on undue influence, to which our own law has unhappily contributed of late some important decisions, and on "catching" or usurious bargains, which Scotland is apparently too poor or too prudent to contract. The Jew seldom appears in our reports, and we fail to recall any tale of a Scottish spendthrift and sixty per cent.

We have only space to notice the appearance of the Parliament House Book for 1881-82, which maintains its usual high character for useful information.

Obituary.

THE HON. ALEXANDER LESLIE MELVILLE died suddenly at Branstall Hall, his seat in Lincolnshire, on the 19th of November.

Mr. Melville was the fifth and youngest son of Alexander, seventh Earl of Leven and sixth Earl of Melville, and was born at Balgonie Castle, Fife, in June 1800. He was educated at Trinity College, Cambridge, where he took his degree; and was called to the Scottish Bar in 1824, but did not practise much, what he did being chiefly in the criminal Courts. In 1830, having become connected through marriage with the banking firm of Messrs. Smith, Payne, & Smith, he left Edinburgh and took up his residence in Lincolnshire, assuming the management of the Lincoln branch of Messrs. Smith, Elison, & Co., in which he continued as senior partner till his death.

The Month.

Exemption of Literary and Artistic Societies from Local Rates.—We mentioned in our last issue, when reviewing Mr. Crichton's able pamphlet on this subject, that we believed a society in Glasgow had been recently refused a certificate of exemption on the ground, *inter alia*, that the subscriptions, though voluntary, were not annual, each member paying a slump sum at entry. It is one of the absurdities of an absurd piece of legislation that an appeal is allowed from the official appointed to grant the certificate in the first instance to the Justices of the Peace sitting in quarter sessions. Now the official to whom application was originally made under the Act was either the Lord Advocate or the barrister appointed by him to certify the rules of Friendly Societies, who was generally one of the Advocates-Depute; by the Friendly Societies Act, 1875, the jurisdiction conferred on the Lord Advocate by 6 and 7 Vict. cap. 36, was taken away from him and vested solely in the Registrar of Friendly Societies, who must be, in terms of the Act, an advocate or solicitor of not less than seven years' standing. Presumably, therefore, the official who has the primary power of granting or withholding the certificate is a more competent person to judge of the fitness of a society to enjoy the benefits of the Act than a bench of justices, none of whom have probably had any experience in the interpretation of Acts of Parliament, or knowledge of the previously decided cases on the question. As far as we can gather from the ridiculously incompetent reports of the case which have appeared in the daily papers (that in the *Scotsman*, for instance, containing no less than three errors, including the omission of the word "not" in the principal sentence), the decision of the registrar refusing to grant a certificate in the case of the society referred to—the Glasgow Institute of the Fine Arts—was appealed to the quarter sessions, and the appeal was disposed of the other day. The justices dismissed the appeal and sustained the deliverance of the registrar, chiefly, it

would appear, upon the opinion stated by the latter that as one of the objects of the society was to relieve poor and necessitous artists, and as these artists might be members of the society, this would constitute a "gift" to the members within the meaning of the Act. It is satisfactory to know that substantial justice to the ratepayers was done in the end, but we hardly think the reason on which their Honours went so strong a one as that to which we adverted above, viz. that the society was not supported by *annual* voluntary contributions: this consideration may, however, have had due weight with the bench, but, as we have often had occasion to remark, when the Scottish daily newspapers attempt to report anything of the nature of a legal proposition or argument, the result is generally chaos.

Violation of Tombs.—The recent discovery at Dunecht has called public attention to a species of crime which it was hoped had become extinct. Old people can call to mind a dismal period, the horrors of which may be said to have culminated in the tragedy of Burke and Hare. In so far as the science of anatomy is concerned, the occupation of the "body-snatcher" is certainly for ever gone. But apparently it has only passed into the hands of more skilled and more exalted criminals, who hope to trade upon the outraged feelings of mourning relatives.

Men naturally ask what is the law upon the subject? We noticed an article the other day in the *Pall Mall Gazette*, in which the writer calmly ignores the fact that the Dunecht criminals must be tried under the law of Scotland. His readers are gravely told that there can be no trial for larceny. He might have added that there could be no grand jury. But practically the law of the two countries is the same upon the point in question. The crime with which we are dealing is not an act of theft, which is the Scottish for larceny. Upon both sides of the Border it is a minor offence involving an arbitrary punishment. There is very little law upon the subject. Hume says, "The raising of a dead body from the grave cannot in any proper sense be regarded as a theft, but may be prosecuted as a great indecency, and a crime of its own sort, the *crimen violati sepulchri*." The cases referred to in the notes upon this passage in the text certainly indicate how arbitrary has been the punishment. Thus in 1803 Archibald Begg was banished from Scotland for fourteen years on his own petition; in 1815 four Aberdeen medical students were fined and imprisoned for fourteen days, although the charge against them was thought of sufficient importance to be tried at circuit. Six months' imprisonment, with or without security for future good conduct, seems to have been the usual sentence for some time after this, but in 1823 a man who had been previously convicted was transported for seven years.

The only authority for holding that the act of taking an unburied corpse is one of theft is the old case of *Mackenzie*. The relevancy

of the charge appears to have been sustained by a single judge upon circuit at Inverness. It is difficult to see what is the distinction which the fact of burial thus appears to make. Alison says, "*The crimen violati sepulchri* is not considered as a branch of theft, for our practice acknowledges no property in the remains of deceased relations after they have been committed to the grave." But is the body while unburied private property? It is in the lawful custody of others certainly, but does it not continue to be in such custody after it has been deposited in the vault or grave. It lies in ground which is private property at all events, and may it not be said to become part of that property?

Assumed Jurisdiction of the English Courts over Scotsmen.—A meeting of a joint committee, consisting of representatives of legal bodies from various parts of Scotland, met on December 19 in the Advocates' Library, Edinburgh, on the invitation of a committee of the Faculty of Advocates, to consider this question. The following gentlemen were present: The committee of the Faculty of Advocates, consisting of Messrs. J. Guthrie Smith, H. Johnston, M. T. S. Darling, J. H. Begg, G. Burnet, A. Ure, and A. Jameson, convener; Messrs. J. Clerk Brodie, W.S., Dr. J. T. Mowbray, W.S., and John Cook, W.S., representing the Society of Writers to the Signet; Messrs. J. Lamond, S.S.C., president, W. Saunders, S.S.C., vice-president, and William Miller, S.S.C., of the Society of Solicitors before the Supreme Courts; Mr. G. M. Wood, of the Society of Solicitors-at-Law; Mr. David Littlejohn, of the Society of Advocates in Aberdeen; Mr. Andrew Hendry, of the Faculty of Procurators, Dundee; Messrs. J. A. Spens and T. C. Young, of the Faculty of Procurators in Glasgow; Mr. Robert Russell, of the Faculty of Procurators in Paisley; Messrs. Alex. Graham, solicitor, Crieff, president, and J. M. Miller and David Keay, solicitors, Perth, vice-president and secretary, of the Society of Solicitors of Perthshire; Messrs. John Lockhart, secretary, and D. Dougall, member, of the Ayr Faculty of Solicitors; Mr. John Symons, sen., Dean of the Faculty of Procurators of Dumfriesshire; Mr. Alexander Cameron, solicitor, Elgin, representing the Society of Solicitors of Elginshire; Messrs. James Clarke, secretary, and William Burns, of the Faculty of Solicitors of Inverness-shire; Messrs. Ebenezer Morrison, Dean, and William Stevenson, sub-Dean, of the Society of Solicitors and Procurators of Stirling—Mr. Jameson in the chair. A full discussion of the question took place, in the course of which most of the gentlemen present stated their experience of the inconvenience and injustice of the practice of summoning Scottish defenders in the English Courts; and thereafter the following resolutions were proposed, seconded, and unanimously agreed to:—

1. That in the opinion of this meeting the experience of the past six years has proved that the practice of the English and Irish Courts of—ving their summonses upon persons resident in Scotland, in virtue of

the provisions of Order XI Rule 1, of the rules annexed to the Supreme Court of Judicature (England) Act, 1875, and of the Supreme Court of Judicature (Ireland) Act, 1877, has been productive of great hardship, injustice, and inconvenience to Scotsmen in all parts of the country, and especially in the large mercantile centres, and that the subsequent enactment by the English judges of Rule 1A of Order XI. of the Rules of Court in England has not had the anticipated effect of abating the grievance complained of.

2. That this meeting is of opinion that the practice introduced by the Acts and rules referred to in the first resolution, in its application to persons resident in Scotland, involves a breach of the 19th article of the Act of Union, and is, moreover, in violation of the recognised principles of general international law.

3. That the difficulty of determining under the said Acts and rules whether service has been properly made or not, has been frequently found in practice to be very inconvenient in leading practically to two litigations, one on the question of jurisdiction, and the other on the merits of the case.

4. That this meeting is of opinion that the proper remedy for the grievance complained of is the restoration of the law in this matter, as regards Scotland, to the footing on which it stood prior to the enactment of the Acts and rules referred to, and that, by the exemption of Scotland from the operation of the same or of any similar enactments, so that in future the plaintiff or pursuer must, in accordance with the rules of international law, sue any person resident in Scotland against whom he has a claim in the Courts of that country.

5. That this meeting instruct the convener of this committee to arrange for a deputation to wait on the Law Officers of the Crown for Scotland, and on Lord Rosebery as Under-Secretary of State for the Home Department, to lay before them the views of this committee as representing the various legal bodies throughout the country, and to request them as soon as possible to prepare and bring in a bill to remedy the evils complained of.

Thereafter the following executive committee was appointed, viz. Messrs. J. C. Brodie, J. Lamond, W. Miller, G. M. Wood, J. A. Spens, T. C. Young, A. Hendry, A. Jameson, convener, G. Burnet, secretary.

Are Wood-pigeons Vermin?—The question whether under the Gun Licence Act of 1870 wood-pigeons are to be considered vermin, which involves the practical question whether a man who carries or uses a gun for the purpose of killing them is liable in a penalty if he has not a gun licence, has again cropped up. The case is this. The Gun Licence Act of 1870 (33 and 34 Vict. c. 57), which, as the preamble and many of the sections clearly show, is simply an Excise Act passed for the purpose of making an addition to the revenue, requires a licence to be taken out yearly by every person who shall use or carry a gun in the United Kingdom, for which licence the sum of 10s. is to be paid (sec. 3). A penalty of £10 is provided for using or carrying a gun elsewhere than in a dwelling-house or the curtilage thereof without a licence (sec. 7). There are a number of excepted cases in which the penalty is not to be incurred. One of these is the case of "the occupier of any

lands using or carrying a gun for the purpose of *scaring birds or killing vermin*." You may scare birds without a licence, but you may not kill them without a licence. Is a farmer, in order to protect his crops, entitled not merely to scare but to kill wood-pigeons without a licence? Of course it is argued on behalf of the defenders in prosecutions of this kind that the exception was introduced for the benefit of, or rather in justice to, farmers who require to use or carry a gun for the protection of their crops—a laudable and indeed a necessary purpose; and in carrying out that purpose it is necessary to kill wood-pigeons, which are destructive to the crops. It seems to us clear that it does not matter in the least for what purpose the exception was introduced, or whether the object which it is supposed was intended to be promoted is a laudable one or not, or whether in the prosecution of that object it is necessary not merely to scare but to kill wood-pigeons. All we have got to look at is the words of the Act. It may have been intended to make an exception so broad as to cover all cases where guns are used for the protection of crops; but if the terms of the Act are not broad enough to cover all these cases, the only remedy is to amend the Act. It is to be remembered, too, that the Act is an Excise Act, the sole object of which is to raise money for the service of the Crown; and we all know that many very laudible things are subject to taxation. When a great minister introduced the Fire Insurance Duty, he remarked that having taxed all the vices they were now beginning to tax the virtues. The simple question in the case is, Are wood-pigeons birds or are they vermin? We say they are not vermin, and therefore that a person using or carrying a gun for the purpose not of scaring, but of killing them, requires a gun licence. The word "vermin" comes from the Latin *vermis*, a worm. It means some creeping, crawling thing, and, regarded as a creature to be shot, an animal such as a rat, or a stoat, or a weasel. In ordinary parlance you would not call wood-pigeons vermin. You would not like vermin for dinner, and you would be very glad to have wood-pigeons if you could get them. In a secondary and metaphorical sense these creatures may be called vermin by a farmer, because they are hurtful to his crops. But that is in the same way that landlords in Ireland are considered to be and are denominated vermin by the land-leaguers because they exact rent for their lands; and expressions occurring in an Act of Parliament are not to be construed in a secondary, artificial, or metaphorical sense. If there were any doubt about the matter, the terms of the exception make it quite clear. There is a clear line of distinction drawn between birds and vermin. There are two categories, birds and vermin, and wood-pigeons undoubtedly belong to the former. The vermin that are referred to in the Act cannot possibly be birds, because the birds are in a class by themselves. It may be asked, Are not hawks, eagles, corbie-crows vermin—noxious and destructive animals? More than one answer
· be given to this argument, but it is sufficient for our present

purpose to say that wood-pigeons are not creatures of the same kind as corbie-crows and company—creatures merely predatory, and themselves of no value.

This question whether wood-pigeons are vermin turned up recently in a case at Jedburgh, and the justices, being evidently in doubt about the matter, leaned to mercy's side and dismissed the complaint. The report in the *Scotsman* states that the case was unprecedented. This is a mistake, as there was a case of the same kind brought up from the Ayrshire Courts to the Supreme Court in 1875, which, however, did not go to judgment. The local agent of the defender in that case, employed, as he states, as agent for a Farmer's Society, writing to the journal mentioned, implies that the Jedburgh justices were wrong in "finding there was no precedent." If they found that, they were quite right. A case is not unprecedented if a similar case has been brought before; but a case which is withdrawn, and in which consequently no judgment is given, affords no precedent. The Ayrshire case was withdrawn, and this correspondent of the *Scotsman* states that "after the discussion, the Solicitor-General of the day—now Lord Watson—said to me that it was a ridiculous prosecution." This is no doubt an interesting autobiographical reminiscence, but it appears to us that (assuming, of course, this autobiographical reminiscence to have more truth in it than a good many autobiographical reminiscences we have read) it was not the prosecution that was ridiculous, but the person who made the remark. The Act, as we have already said, is an Excise Act, an Act for the purpose of adding to the revenue. The prosecutions are brought by the Inland Revenue officials, and all they have got to do in regard to an Act of Parliament is to put its provisions in force, and in doing so to interpret its expressions in their plain, ordinary, natural meaning. They are not to consider the policy of the Act. They would be violating their duty if they were to take a Justice of Peace or Farmer's Society view of the matter and say, "Well! it is very hard that a farmer should be fined for killing these wood-pigeons which are injuring his crops." If it is hard, then the law should be altered; and a Solicitor-General, instead of sneering at those below him for acting up to the law as it stands, would be better employed in giving a hint to those above him to get the law put right.

It ought to be remembered, on behalf of the Inland Revenue officials, who, no doubt, are accused of oppressive proceedings, that they are not Cabinet ministers and high officials. They must act up to the law as it stands, and their private opinion as to the policy of the law is a thing apart. It was the practice of Governments, Conservative and Liberal, for years and years to ignore the provisions of the Judicature Act, which requires a certain number of judges in the Court of Session, because they thought, or had reason to think, or were induced to believe, or were credibly informed, or did not take the trouble to think anything at all

about the matter, that a reduction of the number of the judges would be acceptable to the public mind. The remark invariably made was, "Alter the law if you like, but act up to the law as it stands." But the Inland Revenue officials cannot afford to perform such cantrips.

"What in a captain's but a choleric word,
That in the soldier is flat blasphemy."

And if the Inland Revenue officials were disposed to act in a high-handed fashion in deference to a sectional, supposed to be the general opinion, the fate of those high personages who did so in the case of the Judicature Act would be, or ought to be, a warning to them. When at last an attempt was made to alter the law in the usual, legitimate, and constitutional manner in deference to public opinion, it was found that this public opinion did not exist. In the same way it might be found that the public might think that when everybody else was paying gun-licence duty, no great injustice was done if a farmer was not exempt when he shot wood-pigeons and got a good price for them. In the meantime the Inland Revenue officials have the simple duty to perform of carrying out the law as it stands, and in construing an Act which draws a distinction between birds and vermin, the proposition that wood-pigeons are not birds, and are vermin, is one which, in our opinion, cannot be accepted by any one who has given the subject due consideration.

The Vacancy on the Bench.—It was currently reported in the Parliament House, at the time at which we go to press, that the Dean of Faculty was to be appointed to the place on the Bench vacant by the death of Lord Curriehill. If this proves true, we need not say that such an appointment will command the approval of all parties at the Bar, as well as of the profession in general. The forensic reputation of a counsel is, as we have often seen, no guarantee of his turning out a good judge, but we can hardly conceive a gentleman possessing, as Mr. Kinnear does, the characteristics of a thorough lawyer and a cultured gentleman proving anything but an ornament to the Bench: he has the three great qualifications of a good judge—patience, courtesy, and learning.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS and Sheriff-Substitute SPITTAL.

M'KIDD v. MANSON.

Process—An action in which no step taken within year and day of execution held capable of being awakened and proceeded with—Proof by writ or oath distinct

from a reference to oath.—This action was brought and executed in May 1880 to enforce payment of a bill for £65, and it was met by two defences: (1) "The petition not having been called within a year and day of the execution, could not thereafter be called, and it was incompetent to remove the action;" and (2), "The obligation on the defender in the bill founded on having been extinguished by the substitution of a new bill, the defender is entitled to absolvitor with expenses."

The Sheriff-Substitute (Spittal) took no notice of the first defence, although he virtually repelled it by the following interlocutors. The plea thus passed over cropped up again when the first appeal was taken to the Sheriff.

The whole proceedings are interesting as illustrating the delays which occur in the country in the Sheriff Courts, and are as follows:—

"*Wick, 24th June 1881.*—The Sheriff-Substitute, in respect of the defender's failure to enter a notice of appearance, Decerns against him in terms of the prayer of the petition, and for expenses, of which allows an account to be lodged, and when lodged remits the same to the Auditor of Court to tax and report, and decerns.
CHARLES GREY SPITTAL."

"*Wick, 1st July 1881.*—£2 consigned and defences lodged.

"JAS. CAMPBELL, S.C.D."

"*Wick, 1st July 1881.*—The Sheriff-Substitute, on motion of the defender, Recalls the decree in absence, dated 24th June 1881, and allows the defences now tendered for the defender to be received, and orders the £2 consigned, in terms of section 14 of the 'Sheriff Courts (Scotland) Act, 1876,' to be paid to the pursuer towards his expenses.
CHARLES GREY SPITTAL."

"*Wick, Eo. die.*—Appoints parties' procurators to revise their pleadings within six days each.
CHARLES GREY SPITTAL."

"*Wick, 12th July 1881.*—Present parties' procurators, Continues the cause for adjusting and closing till this day week.
CHARLES GREY SPITTAL."

"*Wick, 19th July 1881.*—Present parties' procurators, Continues the cause for adjusting and closing till Friday first.
CHARLES GREY SPITTAL."

"*Wick, 22nd July 1881.*—Record closed.
CHARLES GREY SPITTAL."

"*Wick, Eo. die.*—Allows the defender a proof of his averment in the 4th article of his statement of facts, said proof to be by writ or oath of the pursuer, and appoints for proceeding with the proof.
CHARLES GREY SPITTAL."

"*Note.*—It appears to me to be incompetent in this action to go into the defender's story about the building of the pursuer's house in Thurso. He does not deny his signature to the bill founded on, and I think the only proof he is entitled to in this action is that allowed above.
C. G. S."

"*Wick, 29th July 1881.*—The defender appeals to the Sheriff.

"PETER KEITH,
Solicitor, Thurso, agent for defender."

"*Wick, 30th July 1881.*—The Sheriff having considered the defender's appeal, Appoints him to lodge a reclaiming petition within eight days from the date of this interlocutor.
GEO. H. THOMS."

"*Wick, 6th August 1881.*—Reclaiming petition lodged of this date.

"JAS. CAMPBELL, S.C.D."

"*Wick, 17th August 1881.*—The Sheriff having resumed consideration of the defender's appeal, with reclaiming petition for him, Appoints the pursuer to lodge answers thereto within eight days from the date of this interlocutor.
"GEO. H. THOMS."

"*Note.*—As calling a summons, so far from being abolished, is recognised by section 10 of the Act of 1876, the Sheriff desires argument in the answers as to the competency of wakening in the circumstances of this case.
G. H. T."

"*Wick*, 23rd August 1881.—Answers lodged. ROB. M'LAUCHLAN."

"*Wick*, 5th September 1881.—The Sheriff having resumed consideration of the defender's appeal, with answers for the pursuer to the reclaiming petition by the defender, Dismisses said appeal, and adheres to the interlocutor submitted to review, with expenses of the appeal in favour of the pursuer as the same may be taxed. GEO. H. THOMS.

"*Note*.—The dicta in *Aitken v. Dick* (July 7, 1863, 1 Macph. 1038) support the pursuer's contention that on execution this case became a depending action, and so could be competently wakened. G. H. T."

"*Wick*, 14th October 1881.—Present parties' procurators, Appoints a minute of reference to the oath of the pursuer to be lodged by the defender on or before this day week. CHARLES GREY SPITTAL."

"*Wick*, 25th October 1881.—The Sheriff-Substitute, in respect of the defender's failure to lodge a minute of reference to the oath of the pursuer, Decerns against him in terms of the prayer of the petition: Finds him liable in the expenses of process to the pursuer, of which allows an account to be lodged, and remits the same to the Auditor of Court to tax and report, and decerns. "CHARLES GREY SPITTAL."

"*Wick*, 1st November 1881.—The defender appeals to the Sheriff.

"GEORGE MILLER SUTHERLAND,
for Mr. KEITH, agent of the defender."

"*Wick*, 5th November 1881.—The Sheriff having considered the defender's appeal, Appoints him to lodge a reclaiming petition within eight days from the date of this interlocutor, and the pursuer to lodge answers within eight days thereafter. GEO. H. THOMS."

"*Wick*, 21st November 1881.—Reclaiming petition lodged on 12th instant, and answers of this date. JAS. CAMPBELL, S.C.D."

"The Sheriff having resumed consideration of this appeal, with reclaiming petition (No. 17) for the defender and appellant, and answers thereto (No. 18), and whole process, Sustains said appeal, and recalls the interlocutors of 14th and 25th October last, and finds the pursuer liable in expenses since 5th September last, as the same may be taxed. GEO. H. THOMS.

"*Note*.—The course adopted by the Sheriff-Substitute of not giving effect to the interlocutor of 22nd July proceeds upon a mistaken notion of what a reference to oath is. He has confounded it with a proof by writ or oath. He should have fixed a diet for the proof allowed on 22nd July, affirmed as that course was on appeal. There is here no renunciation of proof by writ or admission that none exists. The proof to be led may be by both writ and oath of the pursuer, as Lord Stair says (iv. 42, 1), 'If writ be first used, oath may be used in so far as it is not proved by writ.' Accordingly, in his reclaiming petition, the defender states that his averments 'can be established by the pursuer's own books and his other writs.' The diet of proof alone could clear this up. The defender then or afterwards might tender a minute of reference to oath, but he cannot be compelled at any time to do so. Mr. Sellar in his *New Styles* (p. 277) gives the proper form of interlocutor, 'Allows the minute of reference by the pursuer (or defender) to the oath of the — to be received, sustains the same,' etc. The Lord Justice-Clerk in *Forman v. Bookless* (February 27, 1864, 2 Macph. 787) says, 'A reference to oath is essentially different from leading evidence. It is a transaction between the parties, and a solemn transaction involving an appeal to the conscience of the party,' and accordingly cannot be taken down except by the clerk *in extenso*, instead of in notes as if it were evidence. And all the decisions show this great difference. In *Anstruther v. Wilkie* (January 31, 1856, 18 D. 442) further proof was renounced and a final decision pronounced, and yet on the motion of the defender a reference was sustained. A reference after proof was indeed refused in the *Yelverton* case (March 10, 1865, 3 Macph. 645;

and July 30, 1867; 5 Macph. 144; Law Reports, 1; Scotch Appeals, 281); but Lord Curriehill in that case (3 Macph. 664) enters fully into the nature of a reference, and emphasizes, as indeed all the judges do, its *voluntary* nature. The only decree which can be got in the event of the referee's refusal to depone is, 'that he is not, like a contumacious witness, punished by imprisonment or otherwise, but only that he is held as confessed,' which presents a contrast to the procedure in the present case, which ignores the voluntary nature of the act of reference, and does not proceed upon the refusal to depone. The appellant perhaps states his position a little too strongly when in his reclaiming petition he urges that the order upon him to lodge a minute of reference to the pursuer's oath 'is quite different from the case of a defender voluntarily tendering a reference of the case to the oath of his adversary; and in the event of the defender being advised to appeal his case to the Court of Session, the fact of his lodging such a minute, and voluntarily referring the matter to the pursuer's oath, might be prejudicial to his case, as his objection to the limited proof allowed would thereby be held as waived. The oath emitted would be final in regard to the matter referred. But it is not the defender that is making a judicial reference of the case, it is this Court that has limited his proof.' The only answer by the pursuer to this is that the defender never moved the Sheriff-Substitute to fix a diet of proof. It was the duty of the Sheriff-Substitute to fix a diet for proof, irrespective of any motion, immediately on receipt of the process from the Sheriff, and that will now be done. The Sheriff-Substitute's mistake as to this would have induced the Sheriff to find no expenses due since last appeal but for the pursuer's adopting and maintaining that the course adopted by the Sheriff-Substitute was right.

"The Sheriff observes that although the principal delays in this case, which was raised in May 1880, rest with the agents, yet the whole of the summer session after 1st July 1881 was lost by an unnecessary revival of the petition and defences in separate papers (Nos. 13 and 14), and still more delay and expense have occurred in this simple case between debtor and creditor since 5th September 1881. Although it is now near the end of November 1881, the Sheriff hopes that the credit of the Court may be somewhat restored by a decision before the winter session arrives at the Christmas vacation.

"G. H. T."

SHERIFF COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

MACKENZIE v. MACKENZIE.—November 1881.

Executor—Legitimation per subsequens matrimonium.—A. sued B. in an action of accounting as executor of their deceased father. A. had been legitimated by a marriage of his parents subsequent to that of which B. was the issue. Objection to A.'s title, upon the ground that B.'s interests could not be prejudiced by the legitimation of A., repelled.

The Sheriff-Substitute in this case pronounced the following interlocutor and note:—

"*Banff*, 15th November 1881.—Having heard parties' procurators and made *avizandum* with the closed record, Repels the dilatory plea, and sustains the pursuer's title to sue before answer: Allows to the pursuer a proof of his averments contained in article 2 of his condescendence, and to the defender a conjunct probation, and appoints the cause to be enrolled, in order that a day might be fixed for proceeding with said proof, and decerns.

"W. G. SCOTT MONCRIEFF.

"*Note*.—The dilatory plea raises a curious point, but one, in my opinion, of no great difficulty. The pursuer is a half brother of the defender, whom he sues in the capacity of their father's executor. He is met with this plea, 'No

title to sue, in respect that the pursuer having only been legitimated subsequent to the marriage of which the defender is the issue, the latter's interests cannot be affected, so far as regards succession, by such legitimation.' There is no dispute between the parties as to this question of fact, for what the defender states is admitted by minute to be true by the pursuer.

"Ever since the famous case of *Kerr v. Martin* (March 6, 1840, 2 D. 752) it has been decided that an intervening marriage is no impediment to legitimation *per subsequens matrimonium*. It was not necessary in that case to determine what are the rights of a child so legitimated in competition with the issue of an intervening marriage; but from the opinions expressed it may now be held as settled that the former cannot claim any benefit arising from his seniority. As expressed by Mr. Fraser in his law of Parent and Child, 39, he will be postponed in so far as regards succession to the children of the intermediate marriage. He is in fact the younger child. If, therefore, the question in the present case related to heritage, the pursuer, although his father's elder child, could not compete with the defender, who would be the father's heir. But there is no heritage claimed here, and that being the case, it appears to me that there can be no doubt about the pursuer's title to sue. He is just in the position of a younger child, entitled to share equally with his elder brother in the moveable succession. The defender is no more prejudiced than he would have been by his father contracting in the ordinary way a second marriage and having a second family. Writing of the child who has been legitimated, Pothier (upon whom the Scotch judges found) says, 'Le mariage que son père a contracté avec sa mère étant le second mariage de son père, il s'ensuit, qu'il ne peut être regardé que comme un enfant de son second mariage; or il répugne que l'enfant du second mariage soi l'aîné des enfants du premier.' It is clear, therefore, that the dilatory plea cannot stand. Were it sound, an intervening marriage followed by issue would exclude children subsequently legitimated from all interest in their father's succession. As to the subsequent procedure in this case, if parties cannot come to terms, it appears to me that, looking to the documents already in process, it falls upon the pursuer to prove his averments as to articles alleged to be in the possession of the defender, and not accounted for.

"W. G. S. M."

Act.—George.—Alt.—Soutar.

SHERIFF COURT OF PERTHSHIRE.

Sheriff BARCLAY.

HIGHLAND RAILWAY CO. v. M'LAUCHLAN AND M'LAREN.

This was a complaint under the Summary Procedure Act, concluding for fare for travelling without a ticket with intent to defraud. The Sheriff-Substitute dismissed the complaint after proof by the following interlocutor:—

"Perth, 9th November 1881.—Having taken evidence, heard parties' procurators, and made avizandum, Finds the complaint not proved, and therefore dismisses the same, and decerns against the complainer in favour of the respondents for £1 of costs.

HUGH BARCLAY.

"Note.—This is a complaint against two men for travelling in a carriage of the complainers 'without having previously paid their railway fare, and with intent to avoid payment thereof,' whereby they severally incurred a penalty of 40s. each, to be recovered, with expenses, by poinding, or by imprisonment for a period not exceeding three months. This is strictly a criminal case, and must be dealt with accordingly. One hardship the accused suffer in this is, that they cannot be admitted to give evidence. In no instance can this be more severely felt than in the present. It is much to be desired that this restriction on evidence may be removed, and that an accused party in many cases may not be compelled, but may be allowed to give evidence on matters where he alone can give the real facts.

"At the first calling of the case it was objected that the complaint did not specify the train by which the accused travelled and the offence was committed. This did

appear a fatal defect, and in all cases hitherto of this kind this essential was uniformly stated. Without, the accused cannot be prepared to prove an *alibi* a special defence. However, the specialty being verbally supplied, the solicitor for the accused did not press the objection, and it was not recorded.

"The facts are, that the two accused, who reside in the neighbourhood of Blair Atholl, on the morning of Saturday, the 30th day of July, left the station there by the train leaving at 4.55 p.m. The distance is about six miles. The train reached Pitlochrie, where the accused stopped. The train was just about leaving Blair Atholl when they arrived, and they had not time to purchase tickets. They were not prevented taking their seats, but, on the contrary, the guard saw them into the train. They promised to pay their fares at Pitlochrie. Therefore the charge that they had not *previously* paid their fares, '*with intent to avoid payment*,' which is the sole ground of complaint, is negatived. They might have been prevented taking their seats in the train, or afterwards been removed, but the non-payment of the fare at Pitlochrie then became a matter of *civil* debt. The stationmaster at Blair Atholl, on despatch of the train, immediately telegraphed to the officials at Pitlochrie in these terms: 'Two passengers on 4.55 p.m. train. Did they pay excess?' This assumes that it was expected that the train would have passed before receipt of the telegram. An answer was promptly received with the monosyllable '*No.*' The guard forgot at Pitlochrie to ask their fares. The accused left Pitlochrie at 8.55 by the up train. On arrival at Blair Atholl M'Laren showed a ticket, but M'Lauchlan did not, saying, after he searched his clothes, that he had lost it. There is no proof that he had *not* bought a ticket, and the other accused having done so, the presumption is that he also did so.

"The officials appear to have believed the fact that he really had purchased his ticket at Pitlochrie. On 1st August the stationmaster at Blair Atholl reported the non-payment of the fares at Pitlochrie. It does not appear when the stationmaster at Blair Atholl reported the non-production of M'Lauchlan's ticket on the return in the evening. But on the 3rd August a letter was written to M'Lauchlan from the head office, Inverness, stating that he had arrived at Blair Atholl from Pitlochrie on the 30th July without a ticket, and desiring to hear in answer. On 9th August M'Lauchlan wrote a letter, stating that he had bought two tickets at Pitlochrie, for which he paid 1s. 1d., and gave one to M'Laren and had lost the other, and accordingly he remitted 6d. as the price of the lost ticket, which was accepted. The case was dealt with as one of *civil* debt, and no *criminal* measures were taken as to this journey. On the 7th October, being upwards of two months after the alleged offence on 30th July, this complaint was presented, and the accused aver that the service of the complaint was the first notice they received of the alleged offence.

"In the first place, it is difficult to believe that the two parties should be guilty of such a disreputable offence for so paltry a gain as 1s. 1d. The one is designed as a 'farmer,' and the other as a 'carpenter.' They are resident in the locality where the offence is alleged to have been committed. Generally in such cases the offender is a *stranger* in the district, and generally it is perpetrated by one person. Here it is supposed that two parties had entered into a conspiracy to defraud the company to the extent of 6d. to each conspirator. This certainly is of itself not sufficient to acquit, yet character is certainly to be taken into estimation, and even motive is not to be overlooked. The accused aver that they did pay at Pitlochrie. They knew it was known by the officials that they travelled without tickets. Therefore if they did avoid payment, they were sure of detection. There is no proof that they abruptly and clandestinely left the station at Pitlochrie, and, as they were to return in the evening, they again exposed themselves to detection. The officials at Pitlochrie had been informed of the non-payment of the fares at Blair Atholl. It appears to be the practice that when a passenger has no ticket, the ticket-collector takes him to the office, where he pays the excess, as it is called, and which is entered in a book. There is no proof that the accused were checked at Pitlochrie, or taken to the office, but certainly a clerk swore that there were some excess charges exacted and paid on the 30th from Blair Atholl to Pitlochrie. The solicitor for the accused on this called for the record, and it appeared that *no* entry on that day of excess fares from Blair Atholl to Pitlochrie was recorded. It is not necessary to suspect that the young man had received the fares, which he was by the rules not entitled to receive himself. But certainly this does raise a doubt in the case to which the accused are justly entitled to have the benefit. It is pled that the young man, called at the distance of more than two months from the day libelled, may have

made a mistake as to there being excess fares from Blair Atholl paid that day. If so, then the complainers alone are to blame for the delay in instituting the proceedings which led to the mistake. One thing is obvious in this class of cases, that it is desirable that all such ought to be tried immediately after the offence being committed. Such generally is the practice. The Act makes a *limit*, and where the complaint, as here, was not made until almost the lapse of this limit, whilst the accused are in the locality, there exists strong grounds to believe that the case is far from being strong.

"The Sheriff-Substitute is of opinion that when a passenger is allowed to take his seat in a railway carriage without prepaying his fare, but on a promise to pay at the station on his arrival, it becomes a mere *civil* debt. If he can show no passport, he must pay the fare. Indeed, in these cases the bylaw most iniquitously exacts that he shall pay from the most distant part of the railway, but, at all events, the fare applicable for the space actually travelled. If the claim is made in a *civil* action (several of which the Sheriff-Substitute has tried), it would rest on the debtor or defender to prove the payment. But when the company have recourse to a *criminal* action, it obviously rests with them to prove *non-payment* of the fare, with intent to avoid payment. H. B."

Act.—Chalmers. — *All.*—J. Stewart.

Notes of English, American, and Colonial Cases.

CONTRACT.—*Measure of damages—Remoteness.*—The plaintiff sent some horses to stables with which the defendant had contracted to supply him during a fair. Another person to whom the defendant had subsequently let the same stables, turned, with the assistance of the defendant's servants, the plaintiff's horses out of the stables without their clothing, and while they were standing in the defendant's yard until other stables could be procured, some of them caught cold and became depreciated in value. The jury found that the depreciation in value was the result of the breach of contract by the defendant:—*Held* (by the Court of Appeal—*dubitante* Bramwell, L.J.), that the defendant was liable for the depreciation thus caused, and that the damage was not too remote.—*Hobbs v. The London and South-Western Railway Company* (44 L. J. Rep. Q. B. 49; L. Rep. 10 Q. B. 111) questioned. *M'Mahon v. Field*, (App.) 50 L. J. Rep. Q. B. 552.

CONTRACT.—*Writing—Statute of Frauds* (29 Car. II. c. 3), sec. 4—*Parol identification of "arrangement" with agreement in writing.*—In an action for breach of an agreement for the hire, at a monthly payment, of a carriage of the plaintiff for more than a year from the agreement, in which the Statute of Frauds, sec. 4, was relied on as a defence, it appeared that an agreement, such as the one sued on, was made, the terms of which were contained in a memorandum signed by the plaintiff but not by the defendant; that in a letter to the plaintiff, signed by the defendant, the defendant referred to "our arrangement for the hire of your carriage," and to "my monthly payment," and that the only arrangement which he could mean was the agreement contained in the memorandum signed by the plaintiff:—*Held*, that there was a sufficient memorandum in writing signed by the defendant.—*Cave v. Hastings*, 50 L. J. Rep. Q. B. 575.

FRIENDLY SOCIETY.—*The Building Societies Act, 1874, sec. 12—Incorporation—Certificate.*—An action cannot be maintained to impeach the incorporation of a society under the Building Societies Act, 1874.—*Glover v. Giles*, 50 L. J. Rep. etc.

ERRATUM.

Page 627, line 18, for "Crown Cases Reversed" read "Crown Cases Reserved."

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HISTORICAL NOTES ON TITLES OF NOBILITY IN SCOTLAND.

NO. IV. PRECEDENCE.

THE subject of precedence among Peers, as settled by the Decree of Ranking and the Union Roll, has again and again been incidentally discussed by the House of Lords in Scottish Peerage claims under reference from the Crown; but the discussions, having been conducted by English counsel and before English law Lords, have, generally speaking, been eminently unsatisfactory and misleading, what is simple and intelligible to one who has made a critical study of Scottish usages and institutions becoming anomalous and incomprehensible when viewed through English spectacles. It is here proposed to examine the subject in the light which the history and constitutional law of Scotland throw on it.

Looking at the social state of Scotland in the latter half of the fourteenth and the fifteenth centuries, one of its prominent features is the position held by two or three of the greater nobility, more especially the Earls of Douglas and Crawford, who, occupying a far higher platform than their brother nobles, maintained a semi-royal state, having their barons who held of them, their heralds and pursuivants, and their councils of retainers after the model of the Parliament of the nation, and chafing at any interference with their acts by the sovereign. So completely did the Earls of Douglas, in the reign of James II., aim at being the most powerful personages in the realm that some modern historians conceived that they literally aspired to the throne, and framed untenable genealogical hypotheses respecting the grounds of their supposed claim. The idea that the Earl of Sutherland, or even the Earl of

Ross, was entitled to take precedence of Douglas or Crawford on the ground of the higher antiquity of their dignities, would in those days have been wholly unintelligible. And when the Red Douglas came to supplant the Black, which occurred in the end of the reign of James II., the Earls of Angus were regarded as the heirs to all the privileges and immunities of the Earls of Douglas.

Meanwhile a third dignified family came into prominence. The Campbells, who had no right to a foot of property in Argyleshire prior to the reign of Robert Bruce, but who had been gradually but steadily rising in influence from the time when Sir Neil Campbell married the king's sister, became Earls of Argyle towards the close of James II.'s reign. The hereditary offices of Justiciar of Scotland and Master of the Household were conferred on them, and every succeeding generation saw them rising higher and higher, till they occupied a place almost if not quite alongside of the Earls of Angus and Crawford. Huntly alone can be named among the earls as for a time occupying a nearly similar position.

The highest place, however, among these privileged earls was claimed by the Earl of Angus, whose right was connected with the bearing of the crown before the king at coronations and ridings of Parliament, and was supposed to give him a precedence not only over other earls, but over peers of a higher rank. The infringement of this supposed privilege by the Duke of Lennox, who bore the crown in the Parliament of 1592, drew forth a protest from Angus, followed by an answer by the king, that that act should not be prejudicial to the privileges and honours of the earl, and the right which he and his ancestors had to the "first place and first sitting and voting in all Parliaments, first place and leiding of wanguard in battailis, and bearing the crown" (Acts of the Parliaments of Scotland, iv. p. 588). Mr. Riddell quotes from the Douglas charter-chest a promise or declaration by James VI., dated 15th December 1599, that William Earl of Angus "perpetuallie bruik and injoy all the former honoris, privileges, and immunities grantit be ony of oure predecessoris to ony of his forbearis, and in speciall that same place and honour in Parliament, Counsaill, and Conventioun, and beiring of honour that he himself and his forbearis hade of before, notwithstanding quhatsumevir new erectiones or dispositiones of new honouris, styllis, or titles" (Riddell's Peerage Law, p. 156). Mr. Riddell quotes from the same repository an opinion given to the Earl of Angus by that eminent lawyer Sir John Skene favourable to his sitting and voting before dukes and marquesses, an indication that the sharply-defined English ideas of precedence had at least not yet obtained a firm footing in Scotland. A surrender was made of the privilege in question in 1633 by William Earl of Angus when made Marquess of Douglas; but the validity of the resignation was afterwards called in question, and it became the subject of protests.

Reverting to the sixteenth century, we find entries in the "Diurnal of Occurrents" and elsewhere showing that on those public occasions when the Earl of Angus bore the crown, the Earl of Argyle carried the sceptre, and the Earl of Crawford the sword; or the sceptre was carried by Crawford if either Angus or Argyle were absent. Crawford's privilege, though neither connected with hereditary post nor known royal grant, was recognised, as will be seen, in the precedency awarded him in 1606; and we find him bearing the sceptre at the coronation of Charles II. at Scone in 1651 (*Lives of the Lindsays*, ii. pp. 90, 196).

Two other earls who by general sanction had a right of precedency were the holders of the hereditary offices of Constable and Marischal. The family of Hay, who held the Constablenesship from the time of Robert Bruce, only became earls in the fifteenth century. The corresponding post had been suppressed in England on account of the dangerous powers exercised by the officer; and the Constablenesship was in Scotland an office of great dignity. The Marischal was also a very high officer, and had been an earl from about the same date as the Constable.

Among the English ideas introduced into Scotland in the sixteenth century was the notion, of which we can find no trace in earlier times, that earls and lords of Parliament ought to take rank in virtue of priority of creation. The seniority of the unprivileged earls and the lords, which had hitherto been little thought of or discussed, began to become matter of importance, as giving a right to precedence in Parliament and at the riding—that is, the grand procession from Holyrood to the place where the Estates met. One indication of the punctilio which had arisen on the subject is to be found in the conditions generally introduced into resignations and regrants of dignified fiefs, that the new grant should carry the old precedence; this being, however, understood to be the case also in the older charters, where the precedence was unmentioned. As early as 1587 disputes regarding precedency had become frequent and hot; and in that year, and in 1592 and 1597, the subject engaged the attention of Parliament. In November 1600 a commission was granted to the Lords of Privy Council to adjust the precedence of every nobleman within the realm, under which nothing seems to have been accomplished. After the accession of James VI. to the English throne the matter was again taken up, and a commission with a similar object granted to certain peers and Privy Councillors, the result of which was the award known as the Decreet of Ranking. The Commission itself is not extant, but we learn its tenor from the Decreet, and know from the Note of Evidents that the Commissioners included Francis Earl of Erroll, George Earl Marischal (the founder of Marischal College, Aberdeen, and one of the most accomplished noblemen and statesmen of his time), and John Earl of Montrose, Chancellor of Scotland, and afterwards King's Com-

missioner. The Commissioners were empowered to summon the whole nobility to appear before them, and produce "such writs, evidents, documents, and testimonies" as instructed their "place of precedency and priority;" and the ranking fixed by the Commissioners was in all cases to stand good till reduced by any aggrieved peer in the ordinary course of law before the Court of Session, which had the ultimate jurisdiction in all such matters. A large number of the peers summoned appeared by themselves or their procurators, but some failed to put in an appearance before the Commission. The Decreet was pronounced on the 5th March 1606.

The Peerage of Scotland at that time included one duke (Lennox) and two marquesses (Hamilton and Huntly) who were placed first, notwithstanding the claim of the Earl of Angus already adverted to. Among the earls, however, Angus ranked first, and then Argyle and Crawford, on the grounds already explained. The Constable (Erroll) and Marischal followed. Their precedence, in virtue of their official rank, then and afterwards generally admitted, though occasionally called in question, could hardly fail to have been recognised when both were Commissioners. The remaining earls, and the lords who followed them, were ranked according to the newer principle of antiquity of creation, as far as the Commissioners could judge of this from the documents produced by those who compeared. These were principally charters of lands and extracts from the records of Parliament, to which were added certain notes supplementary of these documents made from the public records by the Clerk Register.

We have, not in its original shape, but in a variety of MS. copies, the enumeration of these evidents, both what were produced and what were taken *ex registro*. This inventory of documents, in the form in which we have it, is entitled "*De jure prælationis nobilium Scotiæ*;" and all the known copies of it contain more or fewer additions after the date of the Decreet. To these additions belong notices of creations for some years after 1606; the mention of a charter not produced before the Commissioners, but founded on in a Court of Session process in 1609 by the Earl of Glencairn, and apparently, also, some memoranda from the records about lords who were absent from the ranking; but there are considerable discrepancies in the added parts in the different copies. A copy which is in the General Register House has been printed in the minutes of evidence in various peerage cases. Of three copies in the Advocates' Library, one, which is in the handwriting of Sir James Balfour, Lyon King of Arms under Charles I., is reproduced in Carmichael's "*Tracts concerning the Peerage of Scotland*." A copy, with numerous and valuable notes by Sir Alexander Seton, Lord Pitmedden (a judge of the Court of Session in the time of James VII. who enjoyed a high character for independence and integrity), has been printed in the "*Miscellany of the Maitland Club*;" and a sixth copy is in the British Museum.

Comparing the ranking given with the evidents in the "*De jure prelationis*," which in many cases did not go back to the earliest *origines* of the dignities, the writs in the hands of the Commissioners seem to have been carefully considered, and the Decreet to be strictly conformable to them. The absent and unrepresented peers were, however, on the whole, placed at a disadvantage; and the extracts from the register, which were the only information regarding them, seems to have been construed unfavourably rather than favourably. Although no dates are given in the Decreet, an attentive comparison of the order established among the earls and lords with the evidence alluded to will generally enable us to form a tolerably distinct idea of the dates intended to be assigned, as exhibited in the following scheme:—

EARLS.		LORDS.	
Angus	Bore the crown.	Fleming	No information.
Argyle	Bore the sceptre	Saltoun	1445.
	—Justiciary.	Gray	1452.
Crawford	Bore the sword.	Ochiltree	1455.
Erroll	Official rank as	Cathcart	1460.
	Constable.	Carlyle	1480.
Marischal	Official rank.	Sanquhar	1487.
Sutherland	1346.	Yester	1487.
Mar	1395 or 1404.	Semple	1488.
Roths	1459.	Sinclair	1488.
Morton	1464.	Herries	1489.
Menteith	1466.	Elphinstone	1509.
Eglinton	1503.	Maxwell	
Montrose	1504.	Olipphant	
Cassillis	1510.	Lovat	
Caithness	Absent.	Ogilvy	Absent.
Glencairn	Probably 1511,	Borthwick	
	but absent.	Ross	
Buchan		Boyd	
Moray		Torphichen	1563.
Orkney		Pasley	
Athole		Newbottle	
Wintoun		Thirlestane	
Lindithgow	No information.	Spynie	
Home		Lindores	
Perth		Loudoun	No information; recent, and seem to be correctly ranked.
Dunfermline		Dirleton	
Dunbar		Kinloss	
		Abercorn	
		Balmerinoch	
		Tullibardine	
		Colville of Culross	
		Scone	
LORDS.			
Lindsay	1372.		
Forbes	1378.		
Glamis	1378.		

The dates here given are, it need hardly be said, in various cases later, though in none earlier, than the actual creations of the dignities, even when the relative precedence is right. Of the earls who "compeared," neither Mar nor Sutherland produced documents corresponding to the antiquity of their titles. Mar was the older dignity, but Sutherland, by producing an older charter than Mar, was ranked first.¹ Caithness, Buchan, and Athole had all too low

¹ The Commissioners could certainly never have thought of ranking Mar where they did, but as the dignity held by the Countess Isabel in 1395 and 1404; and it is vain to attempt to identify the earldom in the Decreet with the

a place from being absent and unrepresented. As for Caithness, the Commissioners may have been in doubt whether he really represented the earl whose name was found in the document of 1471, produced "*ex registro*," a doubt intelligible in the peculiar circumstances under which the second earl succeeded. About Buchan there was no evidence; about Athole only negative evidence.

The lords, down to Lord Elphinstone, are ranked in strict conformity to the evidence. The seven who followed, being absentees, were some of them ranked too low, and ought, even by the notes regarding them in the evidents, to have been placed higher; but it is not at all clear that these notes may not have been additions made after 1606. Their position at the close of the "*De jure prælationis*," and beside entries regarding peers created after 1606, seems to suggest this; a supposition further favoured by the great discrepancies in the notes which occur in the different copies.

The Decreet, though by its terms an interim settlement challengeable in the Court of Session, was very generally acquiesced in. Some peers, however, brought actions of reduction before the Supreme Court, and obtained higher precedence. It seems to have been questioned whether by the forty years' prescription introduced in 1617 a ranking not challenged for that period of time did not become absolutely unchallengeable; and out of the doubt on this head grew a practice of protesting from time to time in Parliament for higher precedence, in order to keep the question open. Some of the protests alluded to were directed against the recognition of the old precedences in virtue of privilege of the first five earls, and were founded on the assumption that ranking should be solely regulated by seniority of creation. Mar began in 1639, and Sutherland at a later period, a series of protests carried on till our own day for precedence over all the earls; and the question between Sutherland and Crawford was argued in the Court of Session, but never decided. The Court, on the application of the Countess of Buchan, who was absent and unrepresented in 1606, corrected her ranking; and the Earl of Glencairn, by production of the original charter of 1488, succeeded, after a considerable amount of litigation, in getting a higher precedence than the Commissioners had allowed him.

Another alteration of the ranking, in respect, namely, of the title which has been recently found to have originated in 1565. Whatever view may be taken regarding that creation, the Commissioners assuredly held that the Regent Mar was *de jure* earl in right of his representation of the Countess Isabel. It was but forty years since Queen Mary's restoration charter, and the circumstances of it must have been fresh in the memory of such of the Commissioners as were past middle life. The Earl Marischal was sixteen years of age in 1565, and early initiated into public life. The Earl of Montrose, another Commissioner, whose own titles went back to 1504, could never have allowed himself to be postponed to an earl created sixty years later.

earldom of Menteith, has a remarkable history attached to it. Malise Graham, Earl of Strathern, who had succeeded to that earldom through his maternal grandfather, the eldest son of Robert II. by Euphemia Ross, was in 1427 deprived of it by James I. on the untenable plea that the earldom was a male fee, an act of injustice which helped to bring about the catastrophe of February 1436-37. In 1428 James, by way of compensation, gave him the much smaller earldom of Menteith. His descendant, William seventh Earl of Menteith, a minor in 1606, was ranked in respect of a charter of 1466, the oldest document produced by him, between Morton (ranked 1464) and Eglinton (ranked 1503). Being undoubted heir of line of the second family of Robert II., he in 1630 expedite a service as heir of David Earl of Strathern, and the title of Earl of Strathern was confirmed to him by the king with the old precedency. Charles I., however, advised that this retour might reopen the question of the status of the two families of Robert II., and having had it reported to him that the earl had boasted that he had a better right to the throne than the king himself, had the service reduced in 1633 on palpably groundless pretexts, and evinced the greatest anxiety to cancel all evidence that it had ever taken place. While deprived not only of the earldom of Strathern, but of his offices of Justice-General, President of the Council, and Lord of Session, he, in place of the earldom of Strathern, obtained that of Airth, with the old precedence of Menteith, which was rightly defined as of 6th September 1428, thirty-eight years higher than the date of the charter produced to the Commissioners of 1606, and he was thenceforth known as Earl of Menteith and Airth. Accordingly, on application to the Court of Session, the ranking of the Earl of Menteith on the Roll of Peers was rectified; he obtained a position corresponding to the date 1428, namely, between Mar (1395 or 1404) and Rothes (1459).

The Decree of Ranking, with the alterations thus made by the Court of Session, the omission of attainted and extinct peerages, and those which had been merged in higher titles, and the addition of later creations, became the Union Roll, which was ordered to be laid before the House of Lords on 22nd December 1707. This roll contains 154 peers, namely, 10 dukes, 3 marquesses, 75 earls, 17 viscounts, and 49 barons.

The Act of Union, while it established the existing system of representation of the Scottish peers by sixteen of their number, gave to the peers of Scotland all the privileges possessed by peers of England, except the right to sit in Parliament and on the trial of peers. But it must be kept in view that the privileges of a peer are something quite distinct from his right to his peerage, and there is no provision in the Act of Union withdrawing the latter from the jurisdiction and cognizance of the Supreme Court of Scotland.

Questions of precedence among peers are also no less competent to the Court of Session since the Union than they were before it. A considerable number of protests for precedence stood at the time of the Union on the records of the Scottish Parliament; and in February 1708, when the Union Roll was received by the British House of Lords, it was entered under express reservation of these protests, which were declared to be of the same force as if entered "in the Roll of Peers or in the Journal of the House of Lords" (Robertson's Proceedings relating to the Peerage of Scotland, p. 12). There was therefore no bar to the prosecution of the claims made in these protests before the Court of Session, whose privileges were expressly guaranteed by the Act of Union. One of the most important series of protests was, as already mentioned, directed against the ranking of the Earl of Sutherland below the Earls of Crawford, Erroll, and Marischal, regarding which there had been a provisional decret of the Court in 1706; and action was accordingly revived by a summons of wakening in 1746, but not pressed to a decision. In 1771, when the right of the daughter and heir of the Earl of Sutherland to her father's earldom was called in question, and the case came in the form now usual before the House of Lords by reference from the sovereign, that House fully recognised the validity of the protests referred to, and the competency of action on them before the Court of Session, by ordering intimation to be made to the Earl of Crawford as interested in the question through Sutherland's protests and the action pending on them. There is therefore not the smallest ground for what has been occasionally contended, that the House of Lords has jurisdiction over the Union Roll or power of tampering with it; and such power was very properly repudiated in the report of a Select Committee of the House in 1877.

Were we to enter fully into the history of the Peerage of Scotland since 1707, several unconstitutional encroachments on the jurisdiction of the Court of Session would call for notice. We shall only advert to two of them, which occurred soon after the Union, and took the form of General Resolutions. The earlier of these resolutions, passed on the petition of certain peers dissatisfied with the result of the first election after the Union, was directed against the vote of the Duke of Queensberry, who was also Duke of Dover in the Peerage of Great Britain, and prohibited a Scottish peer who was also a peer of Great Britain to vote at the election of the sixteen representatives. The other resolution, passed in 1711, and directed against the Duke of Hamilton, who had after the Union been created Duke of Brandon, was to the effect that a Scottish peer who is made a peer of Great Britain after the Union does not thereby acquire the right of sitting and voting in Parliament. In both cases the House acted, as has been since admitted, unconstitutionally. The former resolution trenched on the powers of the Court of Session, the latter on the prerogative of the sovereign; and apart

from the question of jurisdiction, the House has since been recognised to have been wrong in point of law in both cases.¹

(To be continued.)

NOTES ON THE LAW OF FIRE INSURANCE.

I. EQUITABLE RIGHT OF NON-INSURED TO BENEFIT OF POLICY.

HAS a person who has suffered loss by fire to subjects in which he is interested, but over which he has effected no policy of insurance, in any case any right in law or equity to participate in the benefit of a policy which has been effected over these subjects by another person? As a rule he has not. A fire insurance policy is a personal contract between the insurer and the assured. It does not "run with the lands;" consequently when a property which has been insured is sold, the policy does not inure to the purchaser. If the property is burned down, the purchaser has no claim to the policy moneys, whoever may have a claim, of which latter point we shall treat presently. Where a property is burned down after the completion of the contract of sale, but before the completion of the conveyance, the same rule prevails. He cannot refuse payment of the price, and he cannot claim the insurance money from the vendor, supposing the insurance company has paid it to the vendor. It seems to us that the non-completion of the conveyance is a matter of no consequence in this relation, and does not alter in the least the rights of the seller and the purchaser. If the sale is

¹ This article was written last summer, and therefore before seeing the interesting chapter or letter on the Decree of Ranking in the newly-published posthumous work of the late Earl of Crawford, "The Earldom of Mar." While it has been thought better to leave these notes exactly as they were originally written, it is gratifying to us to find how closely our conclusions, so far as the same points are touched on, correspond to those of one whose authority is entitled to so much weight on a subject of this kind. Some additional and weighty arguments tending in the same direction will be found in the work alluded to, to which readers disposed to pursue the subject further are referred. Lord Crawford gives from original sources a complete list of the members of the Commission of Ranking of 1606, who, besides the Constable and Marischal, and the Earl of Montrose, as above stated, included the Earl of Dunfermline, then Chancellor; the two greatest legal antiquaries of that time, namely, Lord President Hamilton, afterwards first Earl of Haddington, and Sir John Skene of Curriehill; three other Lords of Session, the Lyon King of Arms (Sir David Lindsay, nephew of the more famous Sir David), the Clerk Register; and Lords Abercorn, Scone, and Elphinstone. A more competent body of Commissioners could not have been selected, or one which would command more respect. The words "priority" and "precedency" occurring together in the Commission and Decree are not looked on by Lord Crawford as tautological, the former word being regarded by him as allusive to ranking in right of privilege, the latter to ranking by date of creation.

complete, the purchaser gets the future benefit and takes the future risk. Nor indeed is the seller bound either to keep up the policy or to communicate the circumstance that a policy exists. All this seems clear enough. But in England these principles have been established only after elaborate discussion in a series of cases.

One of the earliest of these cases is that of *Payne v. Mellor* (6 Vesey, 349). In that case, between the date of the contract of sale and the conveyance the houses were burned down. It was held that the purchaser was bound if he accepted the title, and the circumstance that the seller had allowed the insurance to expire at the date on which the contract was originally to have been completed made no difference. Lord Eldon said: "As to the mere effect of the accident itself no solid objection can be founded upon that simply, for if the party by the contract has become in equity the owner of the premises, they are his to all intents and purposes. They are vendible as his, capable of being encumbered as his: they may be assets, and they would descend to his heirs. If a man had signed a contract for a house upon that land which is now appropriated to the London Docks, and that house was burned, it would be impossible to say to the purchaser, willing to take the land without the house, become so much more valuable on account of this project, that he should not have it. Then as to the non-communication that the policy had expired, I cannot say that, in my judgment, forms an objection, for I do not see how I can allow it, unless I say this Court warrants every buyer of a house that the house is insured, and not only insured, but to the full extent of the value. The house is bought not to the benefit of any existing policy. However general the practice of insuring from fire is, it is not universal; and it is yet less general that houses are insured to their full value or near it. The question whether insured or not is with the vendor solely, not with the vendee, unless he proposes something upon that, and makes it a matter of contract with the vendor that the vendee shall buy according to that fact, that the house is insured."

Lord St. Leonards in his treatise on "Vendors and Purchasers" (14th edition, p. 596) remarks upon this subject: "A vendee being equitable owner of the estate from the time of the contract of sale, must pay the consideration for it, although the estate itself be destroyed between the agreement and the conveyance; and on the other hand, he will be entitled to any benefit which may accrue to the estate in the interim. If after the contract, and before the conveyance, the houses were burned down, the loss will fall on the purchaser, although the houses were insured at the time of the agreement for sale, and the vendor permitted the insurance to expire without giving notice to the vendee."

In the case of *Payne v. Mellor*, all that was directly decided was, that the non-communication of the lapse or approaching lapse of the policy was no good ground of objection to the obligation to

specific performance. It did not, and could not, decide that the purchaser had no right in or to the insurance money in the event of the premises being destroyed. But it seems to imply this, proceeding on the principle that the purchaser had nothing to do with the policy effected by the seller. The much later case of *Poole v. Adams* (33 L. J. Rep. (Ch.) 639) has, however, settled that point. In circumstances where the decision arrived at was attended with considerable hardship, it was held that the purchaser of property insured against fire by the seller does not by the mere fact of the purchase acquire a right in equity to any portion of any insurance money which may have been paid to the seller on the premises being destroyed. After contract of sale of a house had been signed, but before the completion of the conveyance, the house was burned down. The insurance money was paid to a trustee, who, without the knowledge of the *cestui que* trusts, allowed the purchaser to deduct the insurance money from the purchase money on completion of the sale. The trustee became bankrupt, and on an action being raised for the purchase money, Vice-Chancellor Kindersley held that in the absence of any provision in the contract the purchaser was not entitled to the benefit of the money paid to the seller by the insurance company, and that the beneficiaries were entitled to a lien upon the property for the amount deducted by the trustee, as being unpaid purchase money. The Vice-Chancellor said: "The case of the purchaser is certainly a hard one, and I should have been very glad if possible to absolve him from his liability in respect of the £76 odds; but it seems to me well settled that after a binding contract for sale, the property is at the sole risk of the purchaser, who must bear all loss by fire or other accident. There is not in this case any provision in the contract that the purchaser shall have the benefit of the insurance. Whatever the rule of the Court might be as to enforcing specific performance in a case where the property is burned down, it is clear that the contract remained good at law, and that the purchaser might have been sued for breach in refusing to complete and pay his purchase money. The parties must be left to their strict right, and the purchaser cannot be allowed to treat the allowance of insurance money as part payment of the purchase money."

Mr. Dart in his treatise on "Vendor and Purchaser" (5th edition, p. 812) has some comments on the above case of *Poole v. Adams*. His comments may be a useful suggestion of what the law should be, but his representation of the case is not strictly accurate. He represents it as importing "that the vendor may, if he can get it, take his purchase money twice over: once from the insurance office, and again from the purchaser; and equity, although it will not enforce payment by the purchaser, who gets nothing, will not relieve him from the legal consequences of his contract and of subsequent events. Had the former case, *Garden v. Ingram* (a case about a mortgage), been cited, it may be supposed that the Court

would have seen its way to the adoption of the reasonable doctrine, viz. that although in the absence of stipulation a vendor is not bound to keep up or perhaps even to assign a fire policy, yet that as regards any money which he may actually receive under it for damage done to the inheritance subsequently to the date of the contract, he holds such money upon an implied trust to make good the damage. It is obvious that no honest man could for his own benefit act in accordance with the decision in *Poole v. Adams*." Now this case of *Poole v. Adams* did not decide that the vendor may if he can get it take his money twice over. No case has decided that, and as we shall see when we come to consider the case of *Darrell v. Tibbetts*, one case has decided the opposite. All that was decided was that the circumstance of a policy having been effected by the vendor was one with which the purchaser had nothing to do, and consequently he could not get quit of his obligation to pay the purchase money or any portion of it because the vendor happened to have received some insurance money on the policy he had effected at his own hand and for his own behoof. Nor, as we shall see, has the suggestion been given effect to, that the vendor in such circumstances should be regarded as holding the insurance money "upon an implied trust to make good the damage." As for the statement "that no honest man could for his own benefit act in accordance with the decision in *Poole v. Adams*," all we can say is that no man, honest or dishonest, will for his own benefit be allowed to do so.

The latest case on the subject is *Rayner v. Preston* (1880, L. R. 14 Ch. Div. 297). In that case a house had been burned down after the completion of the contract, but before the completion of the conveyance. The seller had effected a policy of insurance over the subjects, and he obtained the insurance money. The purchaser claimed the insurance money. It was argued on his behalf that when a man contracts to buy a house without immediately paying his purchase money, and the vendor has insured the house against fire, and a fire happens before the completion of the contract by the payment of the purchase money, and the insurance company thereupon pays the money to the vendor instead of laying it out in reinstating the house, there is an equity on the part of the purchaser to make the vendor apply the insurance money in part payment of the purchase money; in other words, that the insurance money results to the purchaser without any special contract. The Master of the Rolls (Sir George Jessel) held there was no such equity, and that in a question between the seller and the purchaser, the purchaser had not a right to any benefit from the policy. "If this case were *res integra*," said the learned judge, "and I had to decide it on my view of what was reasonable, I might have found some way to assist the plaintiff; but it appears to me that the case is really concluded by authority." And after reviewing the authorities, his Lordship concluded by observing that "whether we look

at actual decisions, or whether we rely on the text-books on the subject, we find the law treated as settled. I do not think I can in the year 1880 take upon myself to alter what Lord Eldon said in 1801, or what Vice-Chancellor Kindersley said in 1864."

There is one case, *Garden v. Ingram* (23 L. J. Rep. (Ch.) 478), in which a mortgagee was held entitled to the benefit of a policy of insurance which he had not himself effected, and of which no mention was made in the mortgage. But the circumstances were exceptional, there being an express proviso that the policy moneys were to be expended in reinstating the buildings under a covenant to that effect. A lessee had made an agreement with his lessor to insure against fire in their joint names, with a proviso that in the event of the accident occurring the insurance money should be employed for the purpose stated. The lessee assigned the subjects by way of mortgage with a power of sale under which the mortgagee sold. The premises were subsequently damaged by fire and were restored by the mortgagee. On a claim being made by the mortgagee and his vendee, Lord St. Leonards pronounced an order on the mortgagor to deliver up the policy and join with the lessor in signing the receipt to the insurance office to enable the mortgagee to receive the money payable under the policy. His Lordship remarked that "the lessee, the mortgagor as between himself and the lessor, never could have done any act which would have prevented the policy from going to the reinstatement of the premises; for it was an insurance in the joint names of the landlord and tenant, and both these parties had an interest in having it applied to the one object of reinstating the property. In that view it was not material whether the right passed by the assignment or not, because the policy money must go according to its original destination." (This criticism, however, suggests itself, that it was for the lessor and the lessee to object to the money going to another destination than the original one, not for a third person who was no party to the contract.) But independently of this, his Lordship said he "should have been of opinion that the benefit of the insurance would pass to the mortgagee. When a man insures a property under an absolute covenant to insure, and then charges the lease to secure a sum of money, he still retains his interest in the property subject to the charge. When the property is destroyed and the insurance money becomes payable, it cannot be contended that the mortgagor can claim this money against his own mortgagee when the object of effecting the policy was for the purpose of reinstating the premises."

A purchaser, we have seen, whose premises are burned down, whether before or after the completion of the conveyance, has no claim against the seller who happens to have effected a policy for any part of the insurance money which the seller may have obtained from the insurance company. The next question to be considered is, Has a *tenant* any right to claim a share of the

insurance money when his landlord has insured in his own name? In England it has been held not only that the tenant has no claim of that nature when the premises are burned down, but that he cannot refuse payment of the full amount of the rent. So far as regards the tenant's claim to participate in the insurance money, the ground taken is that when the landlord has for his own protection entered into a contract with an insurance company of which the tenant may or may not know anything and himself pays the premiums, that distinct and separate contract is a matter with which the tenant has no concern. In the case of *Leeds v. Cheetham* (1 Sim, 146), where an action was brought by a tenant against the landlord, who was insured, and who received the insurance money when the property was destroyed by fire, the Vice-Chancellor, Sir John Leech, observed: "There being in this case no exception as to accident by fire, the plaintiff continues by law bound to pay his rent. . . . In this respect the equity must follow the law. The plaintiff might have provided in the lease for the suspension of the rent in the case of accidental fire; but not having done so, a Court of equity cannot supply that provision which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract. With respect to the equity which the plaintiff alleges to arise from the defendant's receipt of the insurance money, there is no satisfactory principle to support it. The defendant having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident. But upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant which he has required from the defendant; and to those covenants must he alone resort."

The late Lord St. Leonards, an authority whose opinions on all subjects connected with real estate must always be received with the utmost respect, has given a different statement of the rule of law. He says in his "Handy-Book of Property Law" (1st edition, p. 101): "If, therefore, you mean that a tenant at rack-rent shall insure at his own costs, you must make him agree to do so by the contract. If you omit this, the lease must be so framed as to exempt him from making good accidents by fire. But even in this case *you* are not bound to insure; and although the house should be burned down, yet the tenant must continue to pay the rent; so that each bears his burden; you lose your house, and the tenant loses his rent during the term. *If, however, you have insured, though not bound to do so, and received the money, you cannot compel payment of the rent, if you decline to pay out the money in rebuilding.*"

In *Brown v. Quilter* (1763, Ambler's Reports, 619), where an action had been brought for rent, and the tenant filed a bill for an injunction, and to compel the landlord either to rebuild the house or to pay the insurance money to him, the tenant, Lord Chancellor Northington said: "Though this covenant does not extend to oblige the defendant to rebuild, yet when an action is brought for rent after the house is burned down, there is a good ground of equity for an injunction till the house is rebuilt." But the relief offered in this case was not absolute. It was only offered to the tenant if he would give up his lease: "The defendant in his answer offers an equity, which is to take back the lease and consent to its being cancelled." However, the tenant refusing to give up the lease, the bill was dismissed with costs.

The above-quoted passage in Lord St. Leonards Handy-Book was brought before the notice of the Court of Queen's Bench in the case of *Loft v. Dennis* (28 L. J. Rep. (Q. B.) 168). The doctrine stated in the last sentence was repudiated, and the old view adhered to. The case was an action for rent. The tenant pleaded in defence that he had given a larger rent than he otherwise would have done by reason of the existence of certain buildings on the ground; the buildings had been insured by the landlord; by the terms of the policy of insurance it was stipulated that in case of damage by fire, the insurance company might either pay the amount of damage or reinstate the buildings; the buildings were burned down, whereby the value of the premises to the tenant was of course greatly diminished; but for the insurance by the landlord, the tenant would himself have insured; the landlord, instead of requiring the buildings to be restored, chose to take from the insurance office the amount of damage, and did not himself restore the buildings, although the money so received was sufficient for that purpose, and although the tenant requested the landlord so to do. The Court held this no ground in equity for reducing the sum payable as rent. Lord Campbell, C.J., observed: "By the law of Scotland, if premises are burned by accidental fire, the tenant is relieved from payment of the rent; but that is not so by the law of England, according to which, if there is an absolute covenant to pay rent, such covenant must be performed; and where an action is brought for the rent, it is clearly no ground for the interference of a Court of equity that the premises have been burned down. Then, does any ground for interference arise from the fact that the landlord has insured the premises, and has received the money? I think not; the landlord may have acted unhandsomely, or he may have acted harshly; but there is no equity which prevents him from getting his rent from the tenant, and there is no ground for interference. It seems that the case of *Leeds v. Cheetham*, where the question was determined, was in point, and the decision has not been overruled. We are bound by it, and if the defendant wishes to have it overruled, he must go to

a Court of error; but I entirely agree with it, and I see no difference between the plaintiffs getting this money and their getting a sum of money, for instance, £20,000, as a present from any person for the purpose of paying for the repair of the premises, or if they get it by means of a lottery, because there is no privity between the defendant and the insurance office. I am inclined to pay much respect to the opinion of Lord St. Leonards, as expressed by him in his Handy-Book, but that which he states in the passage referred to does not appear to have been made law hitherto; if it were so, I should support it."

As regards the contention that the tenant has an equitable claim to the benefit of the insurance money, it is to be noted that the case for the tenant is much stronger than the case for a purchaser. The purchaser of a house which is burned down has got what he bargained for, namely, the house. But the tenant for a term of years of a house which is burned down does not get what he bargained for, namely, the beneficial possession for the term of years. And if according to the rule of English law the tenant is still bound to pay rent notwithstanding the destruction of the subject for the use of which the rent is the counterpart, it may reasonably be contended that he is entitled to some benefit from the insurance money as a *surrogatum*. It may further be remarked that seeing fire insurance is a contract of indemnity, the amount the insurance company is bound to pay to the landlord is a matter for consideration. Suppose a house insured to its full value is let under a contract of lease which has still five years to run, it would be giving an unfair advantage to the proprietor if he were to receive the full value of his house without deduction. During these five years he would be receiving the rent of his house and the interest on its value; in short he would be getting two rents, so that he not merely would be indemnified, but would be a profitter by the fire.

The case of *Reynard v. Arnold* (1874, L. R. 10 Ch. 386) is one in which the lessee was held entitled to the insurance money received by the landlord on account of a policy effected by the landlord. But the circumstances were peculiar, and the case in no degree derogates from the authority of the general rule above stated. Indeed the case is not so much a case turning upon the rights and liabilities of lessors and lessees as one illustrative of the doctrine of contribution in fire insurance. The case was this. Under the terms of a lease the tenant was bound to insure against fire, and had an option of purchasing the subjects. He insured in a sufficient sum in their joint names. The premises were damaged by fire, and it then appeared that, unknown to the tenant, the landlord had taken out a policy in another office. Both policies had average clauses. The two offices apportioned the amount of loss between the two policies, and the landlord received the proportion as payable under his policy. The tenant gave notice to exercise his option to purchase, and

proposed that the insurance money under both policies should go in part payment of the price. The landlord claimed to retain for his own benefit the money received under the policy effected by him, and demanded that the money under the other policy should be applied in reinstating the premises, and on the tenant's declining to do so, brought an action of ejectment. The Lords Justices held that the landlord was not entitled to retain for his own benefit the moneys received under the policy effected by him, nor to insist on the moneys being applied in reinstating the property after the tenant had exercised his option of purchase. As was remarked by Lord Justice James, the insurance effected by the lessee became to a great extent inoperative in consequence of the existence of the other policy, of which he had no notice. The lessee then had a right to say that the lessor must account for what he received under that other policy, and having exercised his option of purchase, he had a right to say that the landlord must take the policy money on account of the purchase money." In the later case of *Edwards v. West* (7 Ch. Div. 864), in which *Reynard's* case was founded on, Mr. Justice Fry distinguishes the two cases, and very clearly explains the *ratio* of the latter: "The lessor said, 'I cut your money down by the doctrine of contribution, and yet I don't apply the sum which I receive under that doctrine as a contribution to the common fund for the restoration.' The Lords Justices said that that was inequitable, and I do not think it requires a very great stretch of reason to see that it was very inequitable. The money in the lessor's pocket was the measure of the injury which the lessor had done to the lessee by diminishing his right to receive under his policy."

In the above case of *Edwards v. West*, where also there was an insurance by the landlord and an option of purchase by the tenant, but where the peculiarity about contribution did not occur, a different result was arrived at. In this case, under the terms of the lease, the landlord covenanted to insure, and the tenant had the option to purchase for a fixed sum. Before the time for exercising the option the buildings let were destroyed by fire, and the insurance money was paid to the landlord. The tenant then exercised his right of option to purchase, and he also claimed to impute the insurance money to account of the purchase money. The Court held that the tenant had no claim to the insurance money or any part of it.

The law of Scotland, as Lord Campbell has indicated, differs from the law of England in regard to the rights and liabilities of tenants when the property they occupy is destroyed. According to Scottish law, the contract of lease implies a subject let, and the obligation to pay rent implies the existence of a subject for which and out of which rent is to be paid. Consequently if a house is burned down the tenant is not bound to pay rent. The maxim *res suo perit domino* applies in such a case, and it is applied in this way, that

where two parties have an interest in a subject, each is considered *dominus* according to the nature of his interest, and the subject perishes to each according to the nature of their respective interests therein (*Bayne v. Walker*, July 3, 1815, 3 Dow, 233). This being the state of the law, it follows that the tenant has no claim upon any insurance money which the landlord may have received under a policy which he has effected. It seems to us that the Scottish law is much more equitable as regards this matter than the English law. The English doctrine is one of many illustrations of the tendency of English law to go rigidly upon the terms of the contract, and to lend no favour to any *implied* conditions. The view taken is that a bargain is a bargain, and if you do not insert in the contract a condition to cover the case of an emergency, however extraordinary, you have yourself to blame.

There is one comparatively recent Scottish case which may be noted, not as establishing a general rule, or even affecting the general rule as to the rights of landlord and tenant, turning as the decision did on the peculiar circumstances of the case, but as being one of the few cases in which the tenant claimed to participate in the insurance money recovered under a policy effected in name of the landlord. We refer to *Duke of Hamilton's Trustees v. Fleming*, Dec. 23, 1870, 9 Macph. 329. The tenant of a farm and mill was taken bound by his lease to expend within a certain period £800 in repairing, renewing, and adding to the machinery, and thereafter to maintain it in good working order. He did so expend and maintain. He was also taken bound by the lease to have the whole machinery constantly insured, the landlord relieving him of half the premiums. The insurance was effected in name of the landlord. There was a counter-stipulation, that on the tenant leaving the whole machinery in good working order, the proprietor should be bound to pay him £400. The mill was destroyed by fire during the currency of the lease. It was held that the insurance was solely for the benefit of the landlord, and that the tenant was not entitled to any part of the insurance money recovered by the landlord. But the Court held (*diss.* Lord President Inglis), in reference to the counter-stipulation, that notwithstanding the machinery was not left in good working order, or any order at all, the mill having been burned down, the proprietor was bound to pay the £400; the tenant's inability to leave the machinery in good working order, arising as it did from a *damnum fatale*, not barring his claim. With regard to the £400 one cannot avoid the surmise, that although the Court held the tenant had no right to any part of the insurance money, they did mix up the two wholly unconnected circumstances, the receipt of the insurance money on a policy of which half the premiums were paid by the landlord, and the landlord's liability to pay £400, and that, being influenced by the fact that the landlord had received a large sum of insurance money, they took an equitable, or rather a benevolent, view of the

rights and liabilities of the parties in regard to the £400. Supposing there had been no insurance (and according to the judgment of the Court the case was just the same as if there had been no insurance, the tenant being found to have no claim upon it), could it be said that the landlord was bound to pay the £400, which he was by the contract bound to pay only upon the occurrence of a certain event, when that event did not occur? It was in consequence of a *damnum fatale* that the machinery was not left in good working order, but it would equally have been in consequence of a *damnum fatale* if the tenant did not get his £400. In such a case either the landlord or tenant must suffer in consequence of the accident. But why should the landlord have to pay the stipulated sum when he did not get the consideration on which alone he had agreed to pay the sum? As regards the tenant's claim upon the insurance money: when the tenant had received the sum which he was to get if the lease had gone on to its natural termination, when the machinery would have been surrendered to the landlord, he was clearly not entitled in addition to receive any part of that insurance money to reimburse him for the value of the machinery.

Two other cases in the Scottish reports may be noted in reference to the present subject, the question whether there are any circumstances in which a person not insured has an equitable claim to the insurance money obtained in virtue of a policy effected over subjects in which he is interested. In *Dalglish v. Buchanan & Co.* (Jan. 17, 1854, 16 D. 332) a coachbuilder had insured his own and his customers' coaches. His premises being destroyed by fire, under his policies he recovered enough to indemnify himself and leave a surplus. It was held that he was not bound to communicate to his customers any portion of what he had recovered until he had completely indemnified himself. The customers were not entitled to more than a share of the surplus remaining after that had been done. Indeed it was questioned by the Court whether the coachbuilder was bound to communicate any portion of that surplus; but in respect that he offered to distribute the surplus among the customers, this point was not determined. Lord Ivory observed: "I have grave doubts whether, but for their own volunteer offer, the defenders [the coachbuilders] could have been compelled even to give up the above surplus. . . . It may be very seriously questioned whether the coachbuilder, much less his customers, could have at all enforced the policies against the insurance companies, and it never could found a claim against the defenders. . . . The fact that the insurance company has chosen to pay gives no right to a third party to claim." If the coachbuilder had not offered to divide the surplus, and the customers had, as Lord Ivory indicates they would, been found not entitled to demand it from him, it is clear that, seeing fire insurance is a contract of indemnity, the coachbuilder would not have been entitled to claim as against the insur-

ance company. The insurance company properly, naturally, and for their own interest made no objection to paying the insurance money beyond the amount necessary to indemnify the coachbuilder himself. Having accepted the premiums on account of the insurance of the coaches of the customers, it would have been injudicious to refuse to pay the corresponding insurance money. If the coachbuilder had no insurable interest, the insurance company either ought not to have accepted the insurance, or having accepted, were bound to pay the sum on the occurrence of the accident in contemplation of which the policy had been effected and the premiums had been paid.

The other case is *Gillespie v. Miller & Sons*, Jan. 28, 1874, 1 Ret. 423. The circumstances were as follows: A heap of minerals was sold at 40s. per ton, under a condition that if the purchaser received for it more than 50s. per ton, the seller was to receive half the overplus. Half of one of the heaps was destroyed by fire. The heap had been insured by the purchaser, who, without consulting the seller, abandoned the entire heap to the insurance company at 58s. per ton. The seller, founding on the condition of sale, claimed half of the overplus above 50s. per ton for the whole heap. The Lord Ordinary (Gifford) held both on principle and authority that the seller was not entitled as a matter of right to any part of the insurance money recovered for the minerals that had been destroyed. The Second Division, however, held that the seller was entitled under the contract to receive one-half of the sum received from the insurance company for the whole heap, in so far as the same exceeded the 50s. per ton. The Lord Justice-Clerk (Moncreiff) held it proved that the insurance had been effected and the transaction carried through for the joint behoof of the purchaser and the seller. It does not appear, however, that the seller paid any part of the premiums of insurance. Lord Benholme took the view that the purchaser having obtained a sum in excess of 50s. per ton, was bound to communicate one-half of the excess. Lord Neaves, on the other hand, was of opinion that while the seller would have had no claim to any part of the sums received as indemnity for the minerals destroyed, the purchaser had, by entering into an irregular transaction with the insurance company, disposed of a quantity of the mineral at a price under the market value, and made the rights of the parties inextricable except by treating the transaction as a sale of the whole heap at the price per ton received for it from the insurance company. Unfortunately the grounds of opinion stated by the judges of the Second Division are so discordant that it is impossible to treat it as an authority, or to extract any principle from it. As it appears to us, the judgment of the Lord Ordinary was right. The half of the surplus above 50s. per ton paid for the portion of the mineral destroyed was not due, because that mineral never was sold; and as regards the share of the insurance money, the seller had no right

thereto, being no party to the contract of insurance, which was a private contract between the insurer and the insured with which nobody else had any concern. Assuming for the moment this view to be correct, a question arises, What sum per ton was the insurance company bound to pay to the purchaser for the portion of the heap which was destroyed? Of course if the purchaser and the insurance company chose to make a transaction at 58s. per ton, or £58 a ton, nothing is to be said. That was their own affair. But if 58s. per ton were fixed as the actual value of the mineral, considering that fire insurance is a contract of indemnity, the purchaser would not be entitled to the whole of the 58s. per ton. If he received that, he would be getting more than he would have received in the case of an actual sale, in which case he was bound to communicate to the seller half of the surplus above 50s.

There is one set of circumstances in which a purchaser, or other person interested in buildings destroyed or damaged by fire, has a right to benefit by a policy of fire insurance, although he has no direct right under the policy, and it has not been assigned to him. The Act Geo. III. c. 78, Dec. 83, provides that "in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire with a view of gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered," directors of fire insurance offices are "authorized and required, upon the request of any person or persons interested in, or entitled unto any house," etc., burned down or damaged by fire, or upon any grounds of suspicion "that the owner or owners, occupier or occupiers, or other persons who shall have insured such house or houses, or other buildings, have been guilty of fraud, or of wilfully setting their house or houses, or other buildings on fire, to cause the insurance money to be laid out and expended so far as the same will go, towards rebuilding, reinstating, or repairing such house or houses or other buildings so burned down, demolished, or damaged by fire; unless the party or parties claiming such insurance money shall, within sixty days after his, or her, or their claim is adjusted, give a sufficient security" to the directors "that the same insurance money shall be laid out and expended as aforesaid, or unless the said insurance money shall be in that time settled and disposed of, to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance offices respectively." That is to say, any person interested in or entitled to any building burned or damaged by fire may cause the insurance money to be expended in restoring the building.

The Act was originally a Metropolitan Building Act, and the operation of this provision was at first not unnaturally, and indeed, as we think, properly, supposed to be confined to the metropolis. But it was finally decided by Lord Westbury in the case of *In re Gorey, ex parte Barker* (34 L. J. Rep. (Bankruptcy) 1), that this

provision is of general application. The reasons for holding this were fully stated in an article, in a recent number of this Journal, on the "Construction of Statutes" (vol. xxv. p. 423).

We have seen that, according to the law of England, a tenant, while still liable for the rent of a building burned down, has not at common law a claim upon the insurance money obtained by the landlord under a policy effected by the landlord. His remedy is under this provision of the statute. A tenant of a house or other building surely is a person "interested in" the house or other building.

Before any claim can be made to the benefit of the 83rd section of the Act, a distinct request, not necessarily in writing, but a distinct request must be made by the person claiming to be interested, to have the moneys laid out and expended as far as they will go towards rebuilding and reinstating the house or houses which have been destroyed. The person claiming is not entitled to rebuild the houses himself, and then call upon the company to refund the money so expended. If he does so and claims, the company have a right to say, "No, we will see it done, and it shall be done by our own surveyor." "They would," said Vice-Chancellor Wood, "have a right to say that upon two grounds, first, that they are the persons pointed out by the Act to see this is absolutely done, and that the money is not handed over; and secondly, they have a right to see that the money is properly and judiciously laid out in the way that could be satisfactory to themselves; superintending the buildings in order that neither more nor less than the proper amount be laid out, whatever the value of the property might be" (*Simpson v. Scottish Union Insurance Co.*, 32 L. J. (Ch.) 329). Under this enactment it has been held that "trade fixtures" put up by a tenant, being removable by him, are not comprised in the expression "house or other buildings" in the statute. Consequently, when such fixtures were separately insured, and were destroyed by fire during the tenancy, the landlord was not entitled to have the insurance money laid out under the Act; and a covenant by the tenant to deliver up the fixtures at the determination of the tenancy, as conferring a mere personal right resting in contract, made no difference in this respect (*In re Gorely, ex parte Barker*, 34 L. J. Rep. (Bankruptcy) 1).

THE RIGHT TO RESTRAIN THE PUBLICATION OF PRIVATE LETTERS.

In *Dickson v. Marshall* (July 5, 18 Scot. Law Rep. 651) interdict was asked by the sender of certain letters against their publication by the receiver. The letters had been written in the course of a family dispute, and following upon an action and proof in the

Sheriff Court. The Sheriff-Substitute (Glasgow) and the Sheriff-Principal granted the interdict, but the Second Division held it was not a case for the interference of the Court. Their Lordships held that it is always a question of circumstances whether the receiver of a private letter is entitled to publish it, and that the circumstances in this case were not such as to justify the Court's interference to prevent the publication. Lord Young remarked that there were cases familiar to every one where it has been deemed right by parties for their interest or for their justification that the whole proceedings in an action in which they have been engaged should be published, and it was to him a novel doctrine that such publication should be considered as infringing the right of some person who did not desire such publication. It was, however, observed by the Court that the question would have assumed a different aspect if the letters had been of a literary value, and consequently the subject of copyright had been involved, or if the letters had been of a peculiarly confidential character.

The interest and importance of the case lie in this, that it involves the consideration and determination of the question, what is the foundation of the right to have the publication of letters restrained? The English and the Scottish law are not at one on this subject. Mr. Bell in his *Principles*, sec. 1356, says, "In England it is on the ground of property alone; in Scotland, on the ground chiefly of just and expedient interference for the protection of reputation." The Sheriff-Substitute, in restraining the publication, relied upon the English authorities, and took the view of the English law: "The law as to the right of the writer of a private letter is simple. It appears from a modern English authority, *Oliver v. Oliver* ([1861], 11 C. B. (N. S.) 139), . . . that the receiver has a right of property in the MS., in the *ipsum corpus* of the letter, but that he has no right to alter its nature and use it otherwise than as a MS.;" and reference is made, *inter alia*, to *Gee v. Pritchard* (2 Swans. 402). Now when we find it laid down in so common a text-book as Bell's *Principles* that the English law proceeds on one principle and the Scottish law on another, surely it is the natural thing for a Scottish Court to act upon the principle of the Scottish law. That is to say, of course, unless the principle is flagrantly wrong; and it is for the Supreme, not the Inferior, Court to decide that it is. The principle of the Scottish law does not seem to be flagrantly wrong, either when we consider the reason of the thing or when we look into the opinions expressed in the English authorities cited. Throwing out of view both English and Scottish cases, one would be inclined to say that it is the person who receives and is in possession of a letter who is the proprietor of it, not the person who sends it away and parts with it. As was said by Lord Moncreiff in this case of *Dickson v. Marshall*, "the holder of the letter is in the first instance the master of the letter." Then looking into the leading case of *Gee v. Pritchard*, in which it was

undoubtedly laid down that the restraint on the publication of letters is founded on a right of property in the writer, we find Lord Eldon expressing grave doubts as to whether that was the foundation on which the right ought to be laid. He had doubts, he said, regarding the principles laid down by his predecessors, Lord Hardwicke and Lord Apsley, as to the ground of jurisdiction. But studiously expressing his deprecation of the idea that in the Court of Chancery there were no fixed rules, that every new Chancellor made a law for himself, stating his aversion to giving any ground whatever to the sneer popular since the time of its author, Selden, that the judgments of that Court were just according to the length of the Chancellor's foot, he felt constrained to adhere to the principle laid down by his predecessors. One could hardly expect the Court of Session to depart from the principles which have been laid down as the principles of the law of Scotland in order to accept principles laid down in English precedents which are not binding upon them, which principles a judge so eminent as Lord Eldon had accepted with reluctance, simply because they had been laid down in precedents which he regarded as binding upon him.

The case of *Oliver v. Oliver*, when we look into it, scarcely bears out the statement of its import given by the Sheriff-Substitute, that the receiver of a letter has a right of property only in the *ipsum corpus* of the letter. That case was an action of *detinue*; and it was held that the receiver of a letter has *sufficient* property in the paper on which it is written to maintain an action of *detinue* against the sender, into whose hands it has come as bailee. Chief-Justice Erle, in giving the judgment confirming the ruling of Baron Channell, observed: "In this case my brother Channell said that in the case of letters the paper *at least* becomes the property of the person receiving them. But it is a very different question whether the property in the letters passes to the person to whom they are addressed. In any matters of business it is of the very highest importance that the receiver of the letter should have the right to keep it. We are of opinion that the learned judge laid down the law correctly when he told the jury that the property at least in the paper was in the receiver."

The Scottish decisions cited by the Sheriff-Substitute scarcely seem to bear out his view. Take, for instance, the case of *Cadell and Davies v. Stuart* (June 1, 1804, Mor. Appendix, Literary Property, 4), a case with reference to Burns' "Letters to Clarinda." Clarinda consented to their publication by Steuart, a bookseller. Appearance was put in in the case by the brother of Burns, who was curator to his children. The Court restrained the publication by Steuart. The reporter says, "The ground on which the Court seemed to pronounce the decision was that the communication in letters is always made under the implied confidence that they shall not be published without the consent of their writer, and that the representatives of Burns had a sufficient interest for

the vindication of his literary character to restrain their publication." This is surely not putting the right to restrain on the ground of the property remaining in the sender.

There are many cases in which it would be extremely hard to restrain the receiver of a letter from publishing it, which of course could be done if the property in the letter still remained in the sender. In many cases such publication may be necessary for the vindication of a man's character, to support his reputation for veracity, to justify a public statement that he has made with reference, say, to the views and opinions of the sender of the letter. A candidate at an election states that an opponent, and a virulent opponent, had promised to support him, making the statement to take the sting out of the opposition. The opponent denies this. The candidate publishes a letter from his opponent completely justifying the statement he had made. Would it be fair to deny the right of publication of the letter in these circumstances?

The Court stated that the question would have assumed a different aspect if the letters had been of a literary value. But when are letters of a literary value? There are some men almost every one of whose letters is of a literary value. And in looking over some of these bulky biographies of *quasi*-eminent persons, with which the world is being inundated, the Rev. Oily Gammon & Co., the idols of their congregations, and leading lights in some "body," but really persons of no importance, it is impossible not to observe that many of their letters, which the innocent receiver took for merely rather a clever private letter, was intended to possess a literary value, the distinguished author of it knowing quite well that it would occupy a place in the biography which was sure to follow in the due course of nature.

NOTES IN THE INNER HOUSE.

THE cases of *Finlayson v. Elphinstone* (March 16, 1881, Outer House) and of *Wright v. Wright* (October 20, 1881, Second Division) have this in common, they both spring out of a sentimental grievance, and are connected with the burial of the dead. In the former case, an heritor was interdicted from erecting a chapel for Episcopalian services within what had been at one time the ordinary parish burying-ground, and which still continued to be occasionally used for interments in spite of the existence for two hundred years of a new parish kirk and yard. According to Lord Adam, who tried the case, this piece of ground continued to be held in trust by the heritors for the parishioners, who were entitled to interfere and oppose any use being made of it inconsistent with churchyard uses. The respondents had attempted to add on to an already existing mausoleum a small chapel. His Lord-

ship says, "I do not think it matters a straw whether the building to which an addition is proposed to be made is called a mausoleum. I do not think that makes the least difference." Nor did it matter whether the building interfered with accesses to tombs or not. In the sentiment which obviously lay at the root of this objection to prelatical worship within a parish churchyard he was disposed to share. "Assuming always," he says, "that this churchyard belongs to the Kirk of Scotland, I can quite sympathize with the opinions of those parishioners who do not desire that Episcopal services should be carried on in such a place."

In *Wright v. Wright* a mother applied to have the monumental stone which she had erected over the grave of her deceased son restored. It had been taken away by his brother, who was also executor, as a stone erected upon ground belonging to him without his permission. Query, had he a right to do so? The Sheriff said he had, coming to this conclusion apparently with regret. But Lord Young thought differently. He held it to be unnecessary to inquire whether the mother, in a question with the executor, "could have established a legal right to erect the stone. I am not surprised that there is a scarcity of authority on that point. The good feeling of most people on such a subject make such a dispute very rare. But the mother had erected a tombstone, and was acting in accordance with the custom and the feeling of this country in placing over her dead son's grave this memorial of her affection, and she placed it over a grave acquired in accordance with the dead son's wish; to take this stone away was in my opinion quite illegal."

It is singular how long some points both in law and procedure remain unsettled. Take, for example, that raised in *Fleming v. The North of Scotland Banking Co.* (Oct. 20, 1881, First Division.)

Is it competent to appeal to the Court of Session upon a question of expenses alone? The First Division have answered this question in the affirmative by a majority, the minority consisting of Lord Deas. He and the Lord President state the arguments for the conclusion to which each has come. The Lord President can find no authority which excludes such an appeal. If it is competent to appeal a mere question of expenses from the Sheriff-Substitute to the Sheriff, and from the Lord Ordinary to the Inner House, why not from the Sheriff to the Court of Session? Lord Deas, who viewed the question as one of great importance, remarks: "Expenses are not a cause: expenses are a mere incident, and when the cause ceases to exist the expenses cease also. It requires no authority for that, but I think it would require strong authority for an opposite view, and I am aware of none such." He founds upon the rule of the House of Lords, where an appeal upon a matter of expenses alone will not be entertained. But the other judges were of opinion that this rule did not extend to the Court of Session. Most lawyers will, we think, concur with the views expressed by

the majority of the judges in this case. The rule of the House of Lords cannot be presumed to apply to inferior Courts. Then the hardship of excluding such questions from review might be great. As Lord Shand says, "we know from experience that very great expenses are frequently incurred in Sheriff Courts in cases, for instance, of a proof as to a patent right, and where men of skill have to be examined as witnesses, or in collision cases, and so forth, and the expenses may come to be actually larger than the amount of money originally at stake in the action."

The case of *Galloway and Nivison v. Pollard* (October 21, 1881, Second Division) is an illustration of that useful form of action the multiplepounding brought under somewhat curious circumstances. A trustee litigating was found liable in expenses. Two separate parties set upon him, viz. ordinary creditors of his successful opponents and the law agents who had conducted the case, and obtained decree for these expenses in their own names. The trustee raised a multiplepounding, and the question came to be, Was there really double distress, or was the claim of the agents one which did not admit of competition? Lord Rutherford Clark held that it did not. Their debt, in his view, being ascertained by a decree of Court, nothing could come between them and the fulfilment of this decree save a claim made under it, as would have been the case if creditors of the agents had come forward and arrested the money. But the majority of the Second Division took another view. They held that the question which of the two sets of creditors was to be preferred did not come before them, that was to be determined in the process. Lord Craighill remarked: "No doubt were the merits of the controversy between the competing creditors *hujus loci*, we might be of opinion that the claim of Galloway and Nivison is the one that must be sustained. But the merits of the competition are not now presented for decision, and it would be an inversion of the course of procedure in actions of this character if the competency of this particular process were to be decided upon the assumption as to the merits of the claims which are in controversy." Galloway and Nivison were the law agents who held a decree for the expenses, and whose claim was, according to Lord Rutherford Clark, so clear as to justify them in pleading that there was here no double distress, and that they were entitled to immediate payment.

The case of *Stewart v. Duff* (October 25, 1881, First Division) is of some importance to Sheriff Court practitioners. A proof had been allowed in the inferior Court; the defender presented a petition in terms of section 5 of the Act of Sederunt July 1828, as he was anxious to have the case appealed to the Court of Session for jury trial. The interlocutor allowing proof was dated 18th April, the petition was presented upon the 3rd May following, the defender lodged his depositions upon the 10th, and the Sheriff-Substitute granted leave to appeal by interlocutor dated 6th July. When the

case came before the First Division the appeal was held to be incompetent, because not taken within fifteen days after the interlocutor allowing proof had been pronounced. The Lord President said, "I think it was obviously contemplated that the whole proceedings necessary to enable a party to appeal, if the value of the cause does not appear on the face of the record, must be gone through within fifteen days from the date of the interlocutor allowing proof, otherwise it is imperative on the Sheriff to proceed with the proof so ordered." Lord Deas had some doubts, but was not prepared to dissent. In future, therefore, any person wishing to avail himself of this right of appeal must do so without any delay.

Simpson v. Myles (November 8, 1881, First Division) was a case under the Bankruptcy Statute, raising several points of importance. Simpson applied to the Lord Ordinary (Fraser) for sequestration of the estates of a deceased party alleged to be his debtor. These estates were already under the management of a judicial factor, and had Lord Fraser been of opinion that the Court had any discretion to refuse sequestration when properly applied for, he would probably have refused it upon the ground of inexpediency. But he held, looking to the authority of *Neval's Trustees* (2 D. 1108), that there was no discretion. He found, however, another ground for dismissing Simpson's petition. The voucher which supported it was a cash account bringing out indeed a balance in the petitioner's favour, but without evidence to support any of its items. He held this to be insufficient evidence of a debt: "An open account does not require to be supported by vouchers, because no such vouchers in the usual case exist, and such an account extracted from the books of the petitioning creditor was held sufficient in the case of *Knowles* (3 Macph. 457). But the case is totally different with cash transactions, in reference to which parties (unless in very exceptional circumstances) ought to have vouchers for their disbursements. In the absence of these the Court have held the account and the oath not to be the necessary proof of the debt, so as to warrant sequestration." Before Simpson's reclaiming note was heard other creditors had sought for and obtained sequestration, and they opposed his appeal upon the ground that he had not within the statutory period provided by the 32nd section of the Act sought a recall of the sequestration obtained by them. In giving judgment the Lord President observed, "Whether under particular circumstances it might not be competent to conjoin two petitions for sequestration, and to award sequestration in the conjoined petitions for the purpose of obtaining the benefit of the first deliverance, I do not wish to give any opinion." But he was clear that no such thing could be done here: "The 31st section of the Bankruptcy Act provides that 'the deliverance awarding sequestration shall not be subject to review.' But there is a remedy provided by the statute, and that is a petition for recall presented within forty days of the date of the deliverance awarding sequestra-

tion, and if this petitioner wished to take advantage of it, the statutory remedy was open to him of presenting a petition for recall. But he did not do so, and the time has now elapsed."

In *Coghill v. Docherty* (October 18, 1881, Outer House) Lord Fraser has delivered a judgment of much interest to editors of newspapers. In this case the editor of the *Caithness Courier* was sued by a local magistrate for damages on account of certain letters and paragraphs which had appeared in the paper reflecting, it was alleged, upon the pursuer's conduct as a public man. In the issue which he proposed were the following words: "And did calumniously or injuriously expose the pursuer to public contempt and ridicule." This issue Lord Fraser disallowed. In his note the Lord Ordinary points out that the pursuer's question merely relates to this intention to expose him to ridicule; that the statements complained of were comments upon a public man of a nature familiar to the public; that the pursuer declined to take an issue of malice. But "there is not a newspaper published in which similar tirades against officials will not be found, and unless it be averred and proved that they go beyond the latitude of licence given to the public press of this country in reference to such matters, and are made from malicious motives, they are not actionable. These are the penalties that must be suffered as one of the consequences of exalted office. The vindication of the official who is aspersed and whose conduct is impugned is not by an action at law. He must live down the suggestion of calumny and the judgments of ignorance, and in the end he successfully does so."

The only authority which seems to favour the pursuer's contention that the word "maliciously" need not be in such an issue was the case of *M'Laren v. Ritchie* (July 1856), in which an issue was allowed in these terms: "Whether the said articles, passages, verses, and fictitious advertisements, or any parts thereof, are of and concerning the pursuer, and whether the pursuer is thereby calumniously and injuriously held up to public hatred, contempt, and ridicule to his loss and damage." Mr. M'Laren had been called a "snake," "serpent," and "viper." Upon this case Lord Fraser makes the following observation: "Without in any way venturing to impugn the authority of this precedent, the Lord Ordinary thinks that it may be distinguished from the present case in the circumstances that there was in it an amount of insinuation and abuse which took the case out of the privilege given to the press even with reference to public men who were candidates for seats in Parliament, and in regard to whom it is quite the traditional custom to use language of a very depreciatory nature."

The whole of this note is well worthy of perusal. A great accession of strength has been given to the Scottish Bench in the elevation of Lord Fraser, one who is not only a learned lawyer, but who can express his opinions with such force and clearness.

What is desertion? is the question raised by the case of *Forbes*

of 1868, without which the 70th section of the Roads Act is unintelligible. No reference is made to the curious questions which have arisen under this section.

A Manual of Conveyancing in the Form of Examinations. By the late JOHN HENDRY, W.S. Third edition, revised, by JOHN PHILP WOOD, W.S. Edinburgh: Bell & Bradfute.

THE fact that within a period of little more than twenty years the third edition of this work has been called for is the best proof of its sterling merits. The form of the late Mr. Hendry's Manual is peculiar, being that of a catechism. To cram such a subject as conveyancing would be hopeless. The majority of its students are to live by their science, and must digest its somewhat dry doctrines as their daily bread. Nevertheless there are many, not only amongst students, but in the ranks of professional men, to whom this little Manual will prove of great use. The former can test their knowledge by it, the latter must have frequently occasion to satisfy themselves upon a point of law under circumstances which do not admit of a search through the pages of more formidable volumes. But we say with confidence that if any one takes this catechism as his guide, and honestly studies it with all the light which its able editors have thrown upon the subject by their notes and references, he will obtain a very thorough knowledge of conveyancing. The names of Messrs. Mowbray and Wood, who have in succession revised the Manual, are additional guarantees for its accuracy. Mr. Wood explains the course which he has followed—matter which has been rendered obsolete by recent legislation, except where it had an historical interest, has been deleted, and new questions and answers where necessary have been inserted in the text. The index appears to be very complete.

Obituary.

FREDERICK HALLARD, Esq. Advocate (1844), died at Edinburgh on the 19th ult., aged sixty-one. Mr. Hallard's scholarly and diversified, though somewhat erratic, talents won for him from a wide circle an admiration and respect which his unselfish and sympathetic disposition tended to increase. French by descent and by boyhood's training, he retained through life an individuality of character which no one could fail to observe. Singularly tolerant and forgiving towards the faults or follies of those with whom he came in contact, he had all the impatience of his race at the failure of people to see legal or social problems in the way in which his

quick-witted and unflinching mind presented them to him. It is probable that at a Bar where business is less scanty and competition less great, Mr. Hallard's talents would have won for him the recognition they deserved. But in the narrow, thickly-filled arena of Scottish forensic life the slight failings which time and success might have cured deprived him of sufficient opportunity, and tended only to warp a character not readily susceptible of change.

Mr. Hallard was born in Edinburgh in 1821: his father being a French *émigré* and his mother a Scotchwoman. At an early period of his life he was taken to Normandy, and received an admirable education at Avranches and in Paris. At the age of sixteen he returned to Edinburgh, and entering the University, gained for himself some distinction in his classes, and in the Speculative Debating Society. After the usual training he was admitted to the Bar, where he maintained the reputation he had earned. But he never succeeded in attaining much practice, and his acquaintance with law and litigation was more due to his labours as a Reporter and as Editor of the *Jurist* than to direct experience. A happy marriage and a sparsely filled purse made him gladly receive an appointment to a position from which the prejudices of the day had previously made him shrink, and in 1855 he became one of the three substitutes of Mr. Gordon, the Sheriff of Midlothian.

With most men the content of a happy home and the calm certainties of a judicial position beget an almost negligent equanimity, which after a time gains for him a higher reputation for thought or a lower reputation for laziness than he deserves. With Mr. Hallard that could not be. The keen, restless, versatile mind, too quick in forming impressions, too tenacious in retaining them, led him into positions of which the judicial spirit should have made him wary, and which the mind of many a colleague acting under greater self-restraint would never have reached. But through all these were vividly plain to every litigant, agent, or prosecutor a warm sympathy and an eager, honest wish to say and do the right, and a mind that recoiled from and tried to evade any legal obstacles which the sluggishness of law reform had left in the way, or forensic routine had made it needful to impose. As a *prætor peregrinus* it is probable Mr. Hallard would have gained and left an undimmed reputation; but as a *prætor urbanus* of Edinburgh in the middle of the nineteenth century, the failings, which all leaned to virtue's side, exposed him to attacks and to criticism generally disproportionate to their cause, and mostly unjust. Unfortunately he betrayed that they galled him, and the treatment which he felt ill-deserved tended to incite him to persistence in the course complained of. Perhaps the views he was guided by were right, perhaps they were wrong; it is needless now to discuss. As is the way of the world since the days of Noah and perhaps before them, the conscientiously reasoned course which in

a higher position would have been called firmness was in him derided as obstinacy, and the choleric views of a Sheriff-Substitute were with one voice denounced by many who hardly knew what they were as flat blasphemy.

But once the first severity of the assaults was past, Mr. Hallard's nature asserted itself, and clad in a panoply of self-trust, partly the growth of constitutional firmness, partly the result of an ardent study of the great European philosophers, he presented an unflinching front to all that seemed likely yet to come. But for many future years misfortune seemed to have marked him for her own, and sorrow entered his home. In quick succession child after child was borne to the churchyard: the sweet solace of his wife's love and sympathy was lost to him; and with the few loved ones left he fled to the city from his sunny hillside home to devote the declining years of his life to more than a father's care. But unsatisfied death followed him thither, and stole from him the first-born, whose bright boyhood gave stimulating promise of a brighter manhood. Beneath such a load of undeviating sorrow and disappointment even Mr. Hallard's buoyant nature might well have sunk. At times the depth of his anguish could not be concealed. But time with healing hand mitigated his pain, and the gentle serenity that now marked his manner, while it misled many a friend, gradually gained for him a general appreciation that soothed and gratified him.

What he was as a judge at first he was at the last. Quick to see, he had not the patience which might have showed him the fallacy that occasionally lurked in his terse, succinct judgments. These were always grateful reading. The epigrammatic turn of the Frenchman was alternated with the perspicuous candour of the philosophic student; while dicta and decisions were for the most part conspicuous by the absence of their uninviting, if useful, monotony. No one could doubt the judicial turn of Mr. Hallard's mind: he was obviously a lawyer—much of a cosmopolitan lawyer—not very much of a Scottish lawyer. His annual addresses to the attached procurators of his court were a good example of his clear, doctrinaire mind; they were clever, they were well meant, they were based on a French model, but it is doubtful if they were judicious, to say nothing more. Our readers may remember the passage of arms between Mr. Hallard and this Journal on the subject a few years ago. It is needless to recur to it now. All we wish to say is that if the words of our assailant displayed one phase of his character at times, the vexation he felt at our strictures showed itself only in the letters which we printed.

Mr. Hallard wrote several pamphlets of a legal and ordinary character. The best known is the aggregation of these in the treatise on "The Inferior Judge," as Mr. Hallard termed the office of Sheriff-Substitute, and which he laughingly said described himself. He came forward as an avowed champion of his order, and

said much for the cause he supported. The book is very readable, but would perhaps have attained its end better if it had contained less of defiance and more of defence. Mr. Hallard declined to see any good in the office of Sheriff—his existence depreciated the honour of the Sheriff-Substitute and lessened his pay. Not content with such condemnation, Mr. Hallard proceeded to maintain that where a Sheriff alters a Sheriff-Substitute's judgment, the test of experience by appeal shows that he is more likely to be wrong than right; and he boldly gave the statistics which established this assertion. It is obvious that the man who in this position maintained such theses must lack no courage if he wished to be the Luther of Scottish forensic reform. No one can say Mr. Hallard wanted the courage of his opinions, but it is open to question whether they were advanced with the needed tact and self-restraint. Intrepid, loving, lovable, he is gone from us, and while the critic of his judicial life may find some little things to blame, he will find much to admire and to praise.

FRANCIS HOME, Esq., Advocate, Sheriff-Substitute of Linlithgowshire, died on the 20th January, in the eighty-sixth year of his age. He was the eldest son of Dr. James Home of Cowdenknowes, who was at one time Professor of Materia Medica in the University of Edinburgh. Sheriff Home was the male representative of an old Border family, the Homes of Leader Water, who had been in possession of the estate of Cowdenknowes for five hundred years prior to Dr. Home's death, at which time unfortunately it was found necessary to sell the estate. Sheriff Home was called to the Bar in 1825, and was shortly after appointed Sheriff-Substitute of Kinross-shire, from which he was transferred some years later to Linlithgow. A careful and painstaking judge, he won the confidence and respect of the community in his official capacity, while privately he had the warm affection of all who were privileged to know him.

The Month.

Report by the Directors of the Scottish Trade Protection Society anent the Jurisdiction assumed by the English Courts over domiciled Scotchmen.—1. By an order contained in the appendix annexed to the Supreme Court of Judicature Act, 1875, it was enacted, *inter alia*, that

Service out of the jurisdiction of a writ of summons may be allowed by the Court or a judge whenever the whole or any part of the subject-matter of the action is land, or stock, or other property situated within the jurisdiction, or any act, deed, will, or thing affecting such land, stock, or property; and

whenever the contract, which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damage or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made, and whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done, or is situate within the jurisdiction (Order xi. Rule 1).

2. This order is a rule made by the English judges when dealing with procedure in the English Courts; and although the whole of the rules so made had to be laid before Parliament before they became operative, yet it never occurred to any of the Scotch members of Parliament that there would be anything in them affecting Scotland, consequently this rule among the others passed as a matter of form, without any discussion in Parliament, and without the knowledge of any of the people of Scotland.

3. The scope of this rule is so wide that it may be described as virtually extending the jurisdiction of the English Courts over all Scotchmen.

4. By the Act and Treaty of Union between England and Scotland it was specially provided—"That no causes in Scotland be cognoscible by the Courts of Chancery, Queen's Bench, Common Pleas, or any other Courts in Westminster Hall." And the rights of Scotland under this Treaty were expressly recognised by the Common Law Procedure Act, 1852 (15 and 16 Vict. cap. 76, sec. 18), exempting Scotland and Ireland from the operation of an enactment similar to what is contained in the rule above quoted.

5. This article of the Treaty of Union has thus been violated by an enactment which passed through Parliament unknown to the people of Scotland, and much real injustice and oppression have been inflicted upon the people of Scotland, not only without any real benefit to the people of England, but in carrying out proceedings positively disadvantageous to them, as will be shown hereafter.

6. The obnoxious rule had not long been in operation before it caused great dissatisfaction; and in the beginning of May 1876 a large and influential deputation from Scotland (and another from Ireland) waited upon Mr. Cross, then Home Secretary, and upon the Lord Chancellor (Cairns), and so strongly represented the evils which had arisen under this rule that the Lord Chancellor admitted that there had been an abuse of the jurisdiction, and he promised to make an alteration of the rule which he thought would be sufficient to prevent this abuse in future.

7. His Lordship's observations are important as showing (1) the purpose for which the rule was originally framed; and (2) the manner in which the abuse had occurred; and now that the same evils (which were partially checked for a time) again prevail, they are worthy of careful consideration, and are therefore here quoted verbatim: His Lordship said to the deputation which waited upon him:—

"I should like before you go away just to say a word, because I think there has been a little misconception on one or two points. In the first place, let me say that I am very much obliged to you for coming here to-day and representing your views, because there is always good to be got in discussing grievances of this kind. I should be very glad if those who represent Ireland and Scotland could furnish me with a few or as many as possible of those particular instances in which persons living in Scotland or Ireland have been forced to come to England to defend themselves, in order that we may see in what cases it has been done. Mr. Meldons has given me an instance of a case where two gentlemen in Cork were sued by a merchant in Manchester in respect to a bill of exchange probably given in England, and they had to defend themselves in England—the sum being £30. Now, I am bound to say that I have a very strong opinion that that is a case which was never intended to take place. It was never intended that there should be service out of the jurisdiction in a case of that sort, to bring these parties out of the jurisdiction to defend themselves in England. I cannot help thinking there has been in that case something like an abuse of the jurisdiction. I should be very glad to hear all the cases of that kind which are complained of. Passing by that, I think there is a little misconception about how this question has arisen. It has always been the practice in the Court of Chancery in this country, so long as I recollect, to serve out of the jurisdiction, and to proceed to dispose of the case inside the jurisdiction founded on that service outside. It began first in a limited way, but for many years before this Act was passed the Court of Chancery was in the habit, in all cases where it thought fit and desirable, to serve persons residing in Ireland or any place in the world; but it always acted with the greatest care. It did not lay down any precise rules as to the case, but the peculiar reason in each case had always to be explained to the judge why a person out of the jurisdiction should be served. This constantly happened in the Court of Chancery. The case was not between A. and B., but perhaps between one plaintiff and a dozen or two defendants, and it seldom happened that all these defendants lived in England. In nine cases out of ten one or more of them lived in Scotland or Ireland, or some other place out of England, and the hands of the Court of Chancery would have been tied if it had not been able to give them notice of what was going on; it could not have gone on. The whole principle of the Judicature Act is to give what is called complete relief; that is to say, if John Smith goes to law with Peter Brown, and it turns out that the thing they are going to law about stretches out beyond the case between themselves, and mixes itself up with something in which somebody else has an interest, the Court is to settle the whole thing once for all. Some of these other persons implicated may turn out to be living in Ireland or Scotland, and it would be a very hard thing if the Court could not proceed to do complete justice by reason of some person being out of the jurisdiction, and therefore it was thought desirable there should be power to serve them. But the order No. 11 certainly never contemplated that permission to serve should be given without careful consideration by the judges. I cannot help thinking, if any person came before a judge in this country, saying, 'I want to bring an action for a bill of exchange for £30, and the person is living in Cork, and I want him to come over to London;' the judge ought to say, 'This is not one of the cases intended to be allowed, and I shall not allow it.' This is really not a matter so much of principle as of degree, and I do not think the way to remedy it is by an Act of Parliament. I think it is by an alteration of the rule, if the rule is too wide at present, and if it is not sufficiently guarded and checked." After quoting the terms of the rule, his Lordship proceeded: "It may be said that that is too large and wide, and that experience may show that leave has been given where it ought not to have been given. These rules can be altered by a majority of the judges with my concurrence, and then the altered rule can be laid on the tables of both Houses of Parliament. If the cases which I have taken the liberty to ask for are supplied to me, I will undertake to lay the whole of this matter before the judges,

and point out to them that this rule appears to have been stretched unduly, and to recommend to them to consider a modification or alteration of the rule, to prevent as far as possible cases such as have occurred. I hope they will find their way to make some alteration, and then it will be laid before Parliament."

8. Accordingly on 26th June 1876 a new rule was passed, which provided that

Whenever any action is brought in respect of any contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action when such contract was made or entered into within the jurisdiction, or whenever there has been a breach within the jurisdiction of any contract wherever made, the judge, in exercising his discretion as to granting leave to serve a suit or notice on a defendant out of the jurisdiction, shall have regard to the amount or value of the property in dispute, or sought to be recovered, and to the existence in the place of residence of the defendant, if resident in Scotland or Ireland, of a local court of limited jurisdiction having jurisdiction in the matter in question, and to the comparative costs and convenience of proceeding in England, or in the place of such defendant's residence (Order xi. Rule 1a).

9. This amendment has not proved adequate for preventing the evils it was intended to stop. This is proved from a "Return" (dated 7th June 1877) "of the number of Writs of Summons issued out of the High Court of Justice since 1st March 1876, allowed to be served in Scotland under the 11th order contained in the First Schedule to 'The Supreme Court of Judicature Act, 1875,' or under said rule *as since amended*, and distinguishing between writs allowed to be served where the sole defendant or defendants resided in Scotland and where some of the defendants resided in England."

10. This Return shows that during the period embraced (1st March 1876 till 1st March 1877), excluding the writs (3 in number) issued from the Probate Division, and those (11 in number) issued from the Chancery Division, 123 actions were raised before the High Court of Justice in England and allowed to be served on defendants resident in Scotland. Of these 123 actions there were only three in which there were defendants resident in England as well as defendants in Scotland. So that, according to the Lord Chancellor who framed the rule, there were only three cases of legitimate service under it, while there were 120 instances in which "an abuse of the jurisdiction had taken place."

11. While the people of Scotland have thus been deprived of privileges secured to them by the Treaty of Union, through the abuse of a rule which passed through Parliament without their knowledge, and in circumstances in which they could not reasonably be expected to apprehend that their rights would have been imperilled, they have also been subjected to much real injustice (1) by those parties who "abuse the jurisdiction," using it for the purpose of extorting money not justly due, and (2) by solicitors using it solely for the purpose of increasing costs upon defendants in Scotland. The first of these abuses may be illustrated by the

case of a London salesman who served a summons issued from the Exchequer Division of the High Court of Justice on an Edinburgh merchant for £21, 9s. 7d., the balance of a trumped-up account, with £3, 3s. claimed as *costs of the writ*. The day after the writ was served a letter came through the post stating that if the Edinburgh merchant would pay £17 he would not be troubled for any further sum of either principal or costs. The Edinburgh merchant consulted his solicitor, who informed him that although he should fight the action successfully in London it would cost him more than the £17 demanded by the London salesman. He therefore paid the £17 rather than make a greater loss. This case occurred after the alteration of the rule by the Lord Chancellor. As regards the second of these abuses the Return already mentioned proves that exorbitant costs are levied under the rule in question. For example, here are four cases taken from the Return successively.

No.	Nature of Claim.	Amount.	Costs claimed.	Time limited for Appearance.
16	Goods sold	£30 14 0	£10 10 0	12 days.
17	"	36 4 0	10 10 0	12 "
18	"	39 9 3	12 0 0	14 "
19	"	31 1 9	12 0 0	14 "

These are undefended causes. Now there is not a county in Scotland in which there is not a Debts Recovery Court held every week, in which a decree in absence could have been obtained for the whole of the above cases within six days for 14s. 7d. or 15s. 1d. each. But the £10 or £12 are not the whole of the costs; nor do the ten or fourteen days represent the whole of the delay. Supposing execution has to follow in each of these cases on the decree or judgment obtained in England, the following additional costs and delay are inevitable:—

	Costs.	Delay.
For procuring certificate of judgment, and transmitting same to Scotland	£2 10 0	2 days.
Recording certificate in Edinburgh, and procuring warrant	2 10 0	1 day.
Instructing messenger to charge	0 3 4	...
His fees	0 3 6	...
Currency of charge	15 days.
Making together	£5 6 10	and 18 days,

as compared with the following, if the actions had been raised in the Debts Recovery Courts in Scotland, viz.:—

	Costs.	Delay.
Extracting decree and instructing charge	£0 4 6	1 day.
Officer's fees charging	0 1 6	...
Currency of charge	10 days.
Total	£0 6 0	11 days.

But this does not yet exhibit the full measure of oppression which might have happened, or probably did happen, in each of the four cases above mentioned. The English judgment must be recorded in the Court of Session, and every step of diligence must be done by a messenger-at-arms. And as there are very few counties in Scotland in which there are any messengers-at-arms, the costs are still farther largely increased by travelling expenses. If, for example, the debtor resided at Hawick, a messenger would require to be sent from either Edinburgh or Dumfries, at an additional cost of 1s. 6d. for each mile, besides railway fares. The messenger might require to perform three journeys, but say two in each case, at a further cost of £6.

Taking the smallest costs and the shortest delay in any of the above instances, the case may be stated thus:—

Costs under the rule	£21 16 10
Costs if proceedings had been taken in Scotland (maximum)	1 1 1

Loss of money to the Scotch defender	£20 15 9
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The account, as regards time, would stand thus:—

Delay by proceedings in England under the Rule (minimum)	28 days.
Delay if proceedings taken in Scotland (maximum)	18 „

Loss of time to English creditor	10 days.
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Besides the risk of having the whole (or greater part) of the extra costs to pay if the Scotch defendant should become bankrupt.

12. There might be some justification for violating the Treaty of Union if the proceedings complained of were necessary in order to afford the people of England a means of recovering their debts. But these figures conclusively show not only that such proceedings are unnecessary, but that (except in those cases where they are adopted for extorting money) they are really hurtful to those for whose supposed benefit they have been taken.

13. The Directors, therefore, are of opinion that no amendment of Rule 11 will be sufficient to check the evils which have grown up under it, and that nothing short of its total abolition and the restoration of the law to what it was prior to the making of the rule will be sufficient for this purpose.

14. In conclusion, the Directors desire to say a word as to a remedy which has been proposed under the name of "Reciprocity," meaning thereby a proposal to give the people of Scotland power to sue the people of England in the Scotch Courts under similar circumstances. If the evil complained of was merely that a few Scotch lawyers were being deprived of the fees which are, under the rule, finding their way into the pockets of their brethren in England, the Directors of this Society should not have considered it necessary to have interfered. But they do so because the members of the Society, and others engaged in trade, are suffering

injustice through the operation of the rule in question. They cannot, therefore, see that the people of Scotland can possibly derive any benefit from a proposal for extending to England those evils of which they now complain. Indeed, when "The Judgments Extension Act, 1868," was passing through Parliament, the Directors, foreseeing that a similar injury might be inflicted upon the people of England (from the abuse of certain powers possessed by the Scotch Courts), took an active part in having a special provision (section 8) inserted for the very purpose of protecting the people both of England and Ireland from such proceedings. They have therefore much confidence in claiming equal justice to themselves.

GEORGE HARRISON, *Chairman*.

P. MORISON, *Secretary*.

Election of Dean.—The Faculty of Advocates met on Wednesday the 18th January, being the occasion of the Anniversary Meeting, to elect a Dean in place of Mr. Kinnear. In consequence of that office being vacant, the old custom of the head of the Faculty proceeding to the various Courts armed with his baton of office, and requesting that the business should be suspended in order to allow the Faculty to hold its meeting, was omitted, but the Court rose without the necessity of the exercise of that formality. Three candidates were proposed for the office of Dean: Mr. Macdonald, Q.C., Mr. Mackintosh, and Mr. Trayner. On a poll being taken, it was found that Mr. Macdonald had 96 votes, Mr. Mackintosh 42, and Mr. Trayner 30. Mr. Macdonald was then inducted to office amid loud cheering. He proceeded to thank the Faculty for the honour they had done him in electing him Dean, and said that he would be overwhelmed with a sense of his own demerits did he not feel that he had been chosen by a large number of his brethren, and was cordially accepted by all. When he thought of the long roll of illustrious names which had preceded him in the office, he never hoped to approach them in distinction, or as regarded fulfilment of the duties; but he was cheered by a consciousness that the other gentlemen who had been at this time thought worthy of being nominated for the office, would, he felt sure, give him the benefit of their experience, as he had no doubt they both knew he would have given them his most loyal support had it been the pleasure of the Faculty to place either of them in the chair; but above all he was cheered by the certainty that he would receive the invaluable aid of one who but for his own inherent modesty of disposition would undoubtedly now have been sitting in the chair by the unanimous consent of his brethren, viz. the respected Vice-Dean of Faculty. He could not refrain from saying that while long ago he had learned to regard him with respect, his feelings had blossomed into friendship and ripened into the fruit of affection. With such help he trusted to be able to maintain the honour of the Faculty and to serve its interests. After addressing the older members and his own contemporaries, and especially assuring the

junior members of the Faculty that they would always find in him not only one who would aid them in professional matters, but who would be glad to sympathize with them in their troubles and to be a sharer in the pleasure of their successes, he concluded by saying that it was his most earnest hope that when the time came for him to lay down the baton of office he might leave the affairs of the Faculty in as good order as when they had been handed down to him, its honour as unsullied, and that he might carry away with him a share of the affections of them all.

We but echo the sentiments of all the members of Faculty when we say that we are sure the honour of the Bar was never in more safe hands than it is in the person of its present Dean, and that he will prove no unworthy successor of those distinguished men who have held that office.

Appointments.—As we anticipated in our last issue, Mr. A. S. Kinnear, late Dean of Faculty, has taken his seat as a judge in the Outer House under the title of Lord Kinnear. This appointment is one which has been received with universal approbation, and we have no doubt the learned gentleman will fulfil all the expectations formed of him as a judge.

ANDREW RUTHERFURD, Esq., advocate (1857), has been appointed Sheriff-Substitute of Edinburgh in room of the late Mr. Hallard.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE (AIRDRIE).

Sheriff MAIR.

REID v. M'LACHLAN.

Competition for trusteeship.—Sheriff Mair, on Nov. 19, 1881, issued an interlocutor in the competition for the office of trustee on the sequestrated estates of John Hill, timber merchant, Coatbridge. The following is a copy of the interlocutor :—

"Airdrie, 19th November 1881.—Having heard parties' procurators on the notes of objections lodged by Robert Reid, chartered accountant in Glasgow, and Henry M'Lachlan, accountant, Coatbridge, respectively, in the competition between them for the office of trustee on the sequestrated estate of John Hill, timber merchant, Coatbridge, for the reasons mentioned in the subjoined note, Hereby declares the said Henry M'Lachlan, accountant, Coatbridge, to have been duly elected trustee on the said sequestrated estate in terms of the statute: Finds the said Robert Reid liable in expenses to the said Henry M'Lachlan, and modifies the same at the sum of £2, 2s., and decerns.

"WM. LUDOVIC MAIR."

In a note appended to the interlocutor his Lordship says :—

"*Note.*—At the first general meeting for the election of trustee there voted for Mr. M'Lachlan creditors whose claims amounted to £2643, 6s. 4d., and for Mr. Reid creditors whose claims amounted to £1401, 17s. 1d. Mr. M'Lachlan had thus an apparent majority of £1241, 9s. 3d. in his favour. The two competitors lodged objections, but at the debate these, with one exception, were withdrawn. The only objection insisted in was for Mr. Reid to the vote of the Royal Bank of Scotland in favour of Mr. M'Lachlan, 'in respect that the oath made by the deponent, John Baillie Bishop, the secretary of the said bank, was inept and invalid, having been made before William Henderson, who is a clerk in the employment of the said bank at their head office in Edinburgh, and who was disqualified from acting as a magistrate in any matter in which his employers were interested.' The amount of the bank's claims, to which no objection otherwise was taken, was £2418, 13s. 5d., so that if the above objections were sustained, the majority would be considerably in favour of Mr. Reid. At the debate I had the benefit of an able argument from both parties, and at the close of it my impressions were against the validity of the vote for the bank. But upon consideration I have been unable to give effect to the objections. It is important to keep in view, in dealing with the question raised, that jurisdiction is divided into voluntary and contentious. The former is exercised in matters that admit of no opposition, while the latter has place in all questions truly debatable, and which, in their nature, are capable of receiving a judicial discussion. To the former belong such acts as taking affidavits before a magistrate or J.P., the taking of an affidavit by a J.P. is a ministerial, and not a judicial act. It is an act of voluntary jurisdiction which admits of no opposition. As was remarked by the Lord President (Boyle) in *Keir v. The Marquis of Ailsa* (December 18, 1851, 78 D. 243), 'I do not think the performance of a ministerial act like this at all parallel to the case of a judge deciding a cause;' and Lord Cuninghame, in the same case, said (p. 257), 'The objection of relationship and interest has never been held to apply to the ministerial duties of a J.P. in taking affidavits.' In this case the objections taken to the affidavit lodged with an application under the Entail Amendment Act were that the J.P. before whom it was sworn was called as a respondent in the petition, and also that it had been made in England before a J.P. for a Scotch county. The objections were repelled. The case went afterwards to the House of Lords, and there the Lord Chancellor (Lord Brougham) and Lord St. Leonards held the objections untenable. The Lord Chancellor said, 'We come to the question as to the affidavit. That is the only point upon which I confess at one time I had some little hesitation, but not upon the matter of the interest, for it seems to me that that is quite out of the question. A J.P. or magistrate in taking an affidavit is not exercising a judicial function. In the present case the affidavit is that of a person who says that the only charges against the estate are A, B, C, D. But it is urged that one of these sums is a sum which belongs to a person with whom the magistrate is intimately connected. (The connection was that the J.P. who took the affidavit was the husband of a lady entitled to a provision out of the estate.) But if it is true that the party has the charge, the affidavit does not give it or take it away. It leaves it just where it was before.' Lord Brougham said, 'I had originally some hesitation with respect to the affidavit, not as regards the interest of the magistrate taking it, which I hold to be clearly out of consideration in this case, but as to the question of jurisdiction.' The above case and the opinions quoted are in my opinion decisive of the question raised in the present action. The result is that Mr. M'Lachlan has a large majority of votes in his favour, and is therefore declared trustee.

"W. L. M."

Ad.—Wright, Johnston, M'Kenzie, & Aitken—All.—M'Lachlan.

SHERIFF COURT OF PERTHSHIRE.

Sheriff BARCLAY.

COLLINS WOOD v. M'RITCHIE.

Interdict—Right of landlord to protect game.—This was an action by a landlord against a tenant, praying the Court to interdict the defender from interfering in any way with the pursuer or his servants in their placing wooden pins at the usual distances from each other in a hay-field upon the farm of Kemphill, extending to sixteen acres, for the purpose of preventing poaching by netting thereon, which field had been recently pinned by the pursuer for such purpose, and the pins had been removed therefrom by the defender; and to interdict him from removing the wooden pins already placed in another grass-field on said farm, extending to nineteen imperial acres, and the pins to be replaced by the pursuer in said sixteen-acre field for said purposes, and also to ordain the defender to restore to the pursuer the wooden pins removed by him from the sixteen-acre field. After hearing parties' agents, the Sheriff-Substitute issued the following interlocutor and note:—

"*Perth, 25th November 1881.*—Having heard parties' procurators, and made avizandum with process and debate, Finds (1) by tack No. 11 of process the pursuer as landlord, and the defender as tenant, are now in right thereof, there was let the lands of Kemphill and Caddam for nineteen years without restrictions, 'but reserving always to the landlord the game and fishings on the said property.' (2) The pursuer does not aver that the defender has in any way interfered with the reserved right. (3) The pursuer avers that he has been in the practice in the beginning of September each year of placing several wooden pins about three feet in length in the grass-fields of the defender's farm for the avowed purpose of protecting the game by preventing the poaching of partridges and other game on said fields by the use of nets, but he does not allege any right to do so by the contract of lease or by common law, or with consent of the defender. But he avers that the defender has removed the pins from his field, and craves an order to have them restored, and for interdict against their removal in future. (4) The defender admits the pursuer's acts and the removal of the pins, but alleges their removal was absolutely necessary in order that he might have the full agricultural use of the field, and in particular that his horses and bestial might with safety pasture thereon, and he alleges and offers to prove that on two occasions he has had two horses severely injured in consequence of coming in contact with these pins: Therefore, in law, finds that there being no stipulation in the lease for right to erect such pins on the defender's fields, nor is consent averred, he is entitled to object to the placing of the pins and to remove the same: Accordingly refuses to grant interdict, assolizies the defender from the prayer of the petition: Finds the pursuer liable to him in the expenses of process, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and to report, and decerns.

HUGH BARCLAY.

"*Note.*—The farm with all its fields are let to the defender for agricultural purposes without restriction. No doubt the game is reserved. But it is not alleged that the defender has in any way interfered with that reservation. The reservation is not to be stretched in any way to the defender's positive injury, and to hinder him having the full use of the surface of the fields for crop and pasturage. This is their paramount use. The game must be subordinate to this. It has been frequently found in the Supreme Court that a tenant is not entitled to take any form of machinery to scare game from making inroads in his crops. It surely must therefore necessarily follow that the landlord is not entitled to take any mechanism to protect the game to the injury of the tenant's possession. It cannot be disputed that stobs or stakes of the magnitude of the sample in process cannot be placed in a pasture-field, at whatever intervals, without interfering with the free pasturage of the field. It is

alleged that the placing of these stobs is to prevent poaching. There are numerous statutes for the protection of game and the prevention of poaching. The pursuer is at liberty to provide a nightly watch on the field. But if stobs or stakes are to be used, then why not pitfalls, traps, and spring-guns? According to the pursuer's plea he has the sole power to determine the number, size, and distances of the stakes. Had such a clause been asked to have been inserted in the lease, would the defender or any tenant submit to such a restriction on the use of his occupancy. It is averred that such is a common practice, and that the defender himself was at one time a consenting party. Though 'universal,' as is alleged, this would not make the practice legal. It may be that many tenants consented, and others, from the kindly feeling which should ever exist between the owners and cultivators of the soil, submitted to the inroad. The defender might even have not objected until he found by experience that he was restrained from the full possession of the pasturage of his fields, for which he paid an adequate rent, and suffered damage from injury sustained by his bestial. H.B."

The pursuer acquiesced in the interlocutor, and no appeal was taken.

Act.—Mackay.—Alt.—Mitchell.

SHERIFF COURT OF NAIRNSHIRE.

Sheriff SMITH.

SIMPSON v. MACLEAN.

Action at instance of married woman living separate from her husband, for aliment of illegitimate child born several years subsequently to the separation, sustained.—A married woman had been separated from her husband for three years. At the end of that period she had a child, of which she alleged another man was the father. She sued for the aliment of this child in her own name, founding on the "Married Women's Property Act, 1877," and the 5th section of the "Married Women's Property Act, 1881." The defender, on the other hand, pled, 1st, That the Acts of Parliament founded on were inapplicable, and that the instance being defective the action fell to be dismissed; 2nd, *Pater est quem nuptie demonstrant*.

The Sheriff-Substitute, after hearing debate on the preliminary pleas, issued the following interlocutor:—

"*Elgin, 28th November 1881.*—The Sheriff-Substitute having considered the cause, Repels the defences in so far as preliminary: Allows to the pursuer a proof of her averments in so far as not admitted, and to both parties conjunct probation, and appoints the proof to proceed at a time and place to be afterwards fixed. D. MACLEOD-SMITH.

"*Notes.*—There does not appear to be any equitable legal principle affecting the competency of the present action.

"Whatever may be the strength of the presumption that the husband must be the father of the child, it may be possible to show, as matter of fact, that he was not or could not have been so. See *Mackay v. Mackay*, 24th Feb. 1855, 17 D. p. 494. If he was not, it may be equally possible to prove that the defender may have been so.

"The objection to the right of a married woman to sue in her own name is wholly a technical one in the interest of the husband. The interest of any other person to state the objection is to protect themselves from future liability at the instance of the husband. The nature of the present action precludes any such liability, because it is one of the grounds of action that the pursuer and her husband have long ago separated from each other, and because the subject of the action is so repugnant to his conjugal position, that his interference cannot be contemplated in any way. It is also precluded by the consideration that whatever aliment, if any, may be found due to the pursuer, will, in so far as not already incurred and expended by her, be handed in the

shape of small periodical payments to be consumed at the time, and for which there can be no recourse against any person, while in the event of any substantial change of circumstances, a new application may be made to the Court at any time.

"So far as the child is concerned, the action is a necessary one for its immediate means of subsistence. It cannot affect her future status. Nothing done by third parties in this Court during her unconscious infancy or childhood can prevent her from afterwards vindicating her rights in that respect, if she should find herself in a position to do so on any different footing. The effects of this action are limited to its present purposes.

"Even if there were any doubt as to the competency of this action at common law, I think that it comes fairly under the spirit and meaning of the protective clauses of the 'Married Women's Property Act of 1877.' The opinion of Lord Fraser at page 1516 of his work on 'Husband and Wife' is in the same direction. The quotation in the record from the Act of 1881 does not seem to be applicable, but if the foregoing views are correct, the assistance of that Act is not required.

"I do not think that it is incumbent on the Court to insist on the appointment of a curator *ad litem* if no motion be made to that effect. See *Journal of Jurisprudence*, vol. xiii. p. 300. I do not see that it is for the interest or advantage of either party to make such a motion. It is not likely that either of them even know what is meant by a curator *ad litem*, and whatever way the case may go, they will probably think the expenses more than enough without any addition in that way. Of course if the terms of the Act of 1877 are sufficient to cover the right of action, no curator is necessary in any point of view.

"Notwithstanding, therefore, the remarks which are reported to have been made in the case of *Bain v. Wilkinson* (November 9, 1880, 8 Ret. p. 72), I do not feel warranted in refusing to sustain this action, because these remarks formed no part of the actual judgment, and because, if the facts alleged by the present pursuer be substantiated, she has a well-founded claim which it is the business of the law to make effectual, and which there does not seem to be any other mode of enforcing. In the case of *Bain v. Wilkinson* the facts alleged were not substantiated.

"If the child were to become chargeable to the Parochial Board, there can be no doubt that the Parochial Board would be entitled to sue the defender upon the grounds stated. See Poor Law Act of 1845, sec. 71. If so, it is not obvious as a question of law why it should make any difference to him to be sued at the instance of the pursuer. D. M. S."

Act.—Mackenzie & Gordon.—*Alt.*—Campbell.

SHERIFF COURT OF THE LOTHIANS (LINLITHGOW).

Sheriffs DAVIDSON and HOME.

SHANKS AND OTHERS v. D. STEVENSON AND CO.—22nd December 1881 and 3rd January 1882.

Poinding and sale—Sequestration—Interdict.—Messrs. D. Stevenson & Co., merchants, Leith, were creditors of James Shanks, farmer, Deans, Bathgate, to the extent of £25, 17s. 6d., and under an extract registered protest and expired execution of charge Shanks' furniture was poided. In the forenoon of 14th December 1881 the Sheriff granted warrant of sale under the poiding, but within an hour afterwards Shanks' estates were sequestrated under the Bankrupt Statutes. Messrs. Stevenson & Co.'s agent was at once informed of the sequestration having been awarded, and that any further procedure under the warrant of sale was unnecessary. Notwithstanding of the sequestration, however, Stevenson & Co. proceeded to have handbills printed and posted up in Bathgate and the neighbourhood of the Deans, intimating that a sale would proceed on a

certain day. A correspondence followed between Dodds, writer, Bathgate, Shanks' agent in the sequestration, and Miller, writer, Linlithgow, Stevenson's agent, which resulted in the following telegrams and consequent procedure.

Telegram, Dodds to Miller: "*Poinding, Shanks.*—Letter received, and now guarantee whole expenses, to which client legally entitled as same shall be audited. Wire answer that sale will not proceed, otherwise I present petition."

To which Miller answered: "*Poinding, Shanks.*—Account will be taxed and sent you this afternoon, and if paid by Thursday morning sale not proceed."

In these circumstances a petition was presented at the instance of Shanks and Thomas Dodds, solicitor, Bathgate, William Russell, merchant, Bathgate, William Lindsay, coal agent, Bathgate, Newton, Keates, & Co., chemical manure manufacturers, Liverpool, creditors of Shanks, and the said Thomas Dodds as mandatory of the said Newton, Keates, & Co. (who had concurred in the sequestration), in which the Court was asked to interdict the defenders from selling any of the articles advertised to be sold, and to grant interim interdict, with expenses of process. In the condescendence the provisions of the 12th and 108th sections of the Bankruptcy Act of 1856—the latter of which is as follows: "Provided that any arrester or poulder before the date of the sequestration who should be deprived of the benefit of his diligence should have a preference out of such funds or effects for the expense *bond fide* incurred by him in such diligence"—were quoted, and the pursuers pled: (1) The estates of the said James Shanks having been sequestrated under the Bankruptcy Statutes, and declared to belong to his creditors for the purpose of these statutes, the proposed sale by the defenders is *ultra vires*, unwarrantable, illegal, and oppressive. (2) The pursuer Dodds having guaranteed the whole expenses to which the defenders were legally entitled, as same should be audited, the proposed sale is illegal, unwarrantable, and oppressive. (3) It being for the general interest of the pursuers and the whole body of creditors that the sequestrated estates should be secured intact until a trustee is elected, the prayer of the petition should be granted. (4) The defenders not being entitled under the Bankruptcy Statutes or at common law to carry out a sale of poinded goods after sequestration has been awarded, the interdict asked should be granted. (5) As the expenses allowed by the 12th section of the Act of 1856 are limited to the expenses incurred in poinding alone, and the account of expenses, as taxed, contains items incurred in the antecedent steps of the defenders' diligence, the pursuers were justified in declining to pay the same, and the interdict should be granted.

The following interlocutors were pronounced:—

"*Linlithgow, 21st December 1881.*—The Sheriff-Substitute, in respect of a caveat having been lodged by the respondents, D. Stevenson & Co., Appoints parties to be heard thereon to-morrow at twelve o'clock noon within the Sheriff's chambers here.

FRANCIS HOME."

"*Linlithgow, 22nd December 1881.*—Parties heard. The Sheriff-Substitute of the county of Linlithgow having heard parties on the above caveat produced, Grants warrant to cite the defenders on seven days' inducibus, and ordains the defenders, if they intend to show cause why the prayer of the petition should not be granted, to lodge in the hands of the Clerk of Court at Linlithgow a notice of appearance within the inducibus of citation hereon, under certification of being held as confessed, and grants interim interdict as craved, reserving all question of expenses.

FRANCIS HOME.

"*Note.*—The mandate of the agent for the sequestration, as acting for the bankrupt, may still be considered, it is thought, to extend to the keeping of matters right, and preserving the estate under it for the general body of creditors; and indeed the Court itself, in whose hands the said estate may also be held in some measure in the meantime to be, has the same right to interpose for the same purpose, and as the rights of a creditor in the position of a poulder, in this case, seem doubtful under the Bankruptcy Act, and are contested, the Sheriff-Substitute considers it advisable to grant the interim interdict that matters may be kept entire until the question is properly discussed and said rights ascertained.

"F. H."

"*Edinburgh, 3rd January 1882.*—The Sheriff having considered the appeal for the defenders, with their reclaiming petition and the process, Dismisses the said appeal.

ARCHD. DAVIDSON.

"*Note*.—It is unfortunate that this matter was not arranged, as it might have been; but the interdict having been applied for, the proper course has been followed. A. D."

Act.—Dodds—*Al.*—Miller.

SHERIFF COURT OF RENFREWSHIRE (GREENOCK).

Sheriff SMITH.

Employers' Liability Act.—Proof was recently led in the Greenock Sheriff Court, before Sheriff Smith, in an action in which William Hill, riveter, and Mary Ann Hill, millworker, residing at 5 Main Street, Cartadyke, sued the Greenock Stevedore Company for £280 as compensation for the loss of their father, the deceased William Hill, labourer, who resided at 18 Tobago Street. The facts of the case may be gathered from the following interlocutor, which has just been issued:—

"The Sheriff-Substitute having heard parties, and considered the proof, Finds in fact (1) that pursuers' father was employed occasionally by the defenders, and that on the 17th of June last he was employed by them in the discharge of the bark *Lucayas*, in the East India Harbour of Greenock; (2) that the cargo which was being discharged consisted of sugar in bags, and that the defenders used in the operation a steam engine or winch, which was placed on the quay alongside the bark; (3) that the engine was one made by first-class makers; that it was of excellent construction and material, and well suited for the work, and that it was in all respects in perfect working order; (4) that its driver was the witness Robert Smith, a man of experience in the work, and quite competent to perform the duties intrusted to him; (5) that the sugar was raised from the hold of the vessel at the rate of five bags each time, by means of a chain connected with the engine, and to the end of which was attached a hook, which was fastened to slings of rope, into which was put the load of five bags every time the chain was lowered into the hold; (6) that there were four men in the hold, and that two of them at a time filled the slings and attached them to the hook, and when these slings were hoisted out of the hold, the other two men prepared another load to be attached and hoisted in like manner; (7) that the deceased was one of the four men; and that he worked along with the witness Fisher; that they worked together on the morning in question, sending up many sugar-bags quite safely; but after working for about three-quarters of an hour, they filled the slings with a load which, after it had been raised eight or ten feet from the hold, where the men were working, fell down suddenly and struck and killed the pursuers' father instantaneously; (8) that if all had gone right the next load should have been prepared and sent up by the other men, Judge and Harkins; and that it has been a matter of frequent occurrence, and known to be so to the defenders, for the men in the hold, in such circumstances as these four men were in, immediately to busy themselves in preparing a fresh relay of bags so as not to lose any time in sending up the next load; (9) that their doing so is attended with obvious danger in the event of the slings that are being hoisted or any of the contents falling back; that such an event is of not very rare occurrence, and that the defenders' manager and others have frequently warned the men of the risk they were running, but the practice has not been vigorously put down, and the benefit arising from the economy of time has accrued to the defenders, who gain by a quick discharge of the cargo, and not to the workmen employed, who are paid merely for the time they work; (10) that it would have been possible for the deceased, by the exercise of greater caution and prudence than is customary in his class in such operations, or than is enforced by the defenders and other stevedores in Greenock, to have secured himself from the danger of injury from the fall of the slings or their contents; (11) that it is not possible to ascertain with certainty the cause of the fall, but that it is most probable on the evidence that it resulted from the driver Smith having failed to insert properly the clutch of the steam-winch, which failure put the machinery out of gear, and allowed the load to fall back into the hold; (12) that the accident was so sudden and the fall so instantaneous that it was not possible for Smith, nor would it have been possible for any other driver, to prevent the fall by the application of the brake with which the winch was furnished;

(13) that the driver Smith was a fellow-worker of the deceased, employed in manual labour, not having any superintendence intrusted to him, and that he was not a person to whose orders or directions the deceased was bound to conform: Finds in law that the defenders are not liable to the pursuers in any sum as compensation for the death of their father; therefore assolvie the defenders: Finds them entitled to expenses, allows them to give in an account thereof, and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns.

"HARRY SMITH.

"*Note.*—The Sheriff-Substitute thinks that the pursuers have failed to show any legal ground and liability on the defenders' part. He does not rest his judgment on the plea of contributory negligence by the deceased. It is quite true that the deceased was rash in beginning at once to prepare the next relay of bags without waiting till the load that was going up had ceased to be suspended over the place where he was working. And it is equally true that the defenders frequently warned the men in the hold to avoid exposing themselves to the danger that was thereby made inevitable. But while the defenders gave such good counsel in words, they were at no pains to enforce its adoption; the men all thought that they would hear of it if there was any delay when the tackle came down for a fresh load; and the advantage that arose from this too great anxiety for despatch was enjoyed by the defenders, whose interest was the quick emptying of the vessel, and was not at all shared in by the workmen, who were paid by the hour, and whose exposure to the perils of a falling load resulted in an economy of time to their employers. So that it was from overzeal in his masters' interests that the deceased man had to encounter the peril that proved fatal to him. And no doubt the defenders will be ready to acknowledge that the pursuers, his two children, have thereby acquired some moral claim to their consideration. At all events, the Sheriff-Substitute is glad that it is not necessary for him to decide the case on the defenders' second plea, which is that the deceased having failed to withdraw from under the ascending load must be held to have been guilty of negligence, materially contributing to the accident, and that therefore the pursuers cannot get reparation for his death. A safer and more satisfactory ground of judgment appears to be found in the fact that the accident arose from the failure of the driver, William Smith, properly to insert the clutch of the winch. The winch thereby went out of gear, and the load fell in consequence. But it is said by the pursuers that Smith was not a proper, efficient, and skilful driver. They say this was obviously the case, because the man has lost one leg, and no one-legged man is fit, they say, for such a post. The Sheriff-Substitute would be sorry if he were compelled to affirm such a general proposition as that. The result might be to throw out of employment in Greenock and its neighbourhood many hard-working and deserving men who have had the misfortune to lose a limb in one of the accidents which are so frequent among us. If it were to be held sound law that a master employing such a one on a steam-engine is, in the event of any accident with the engine, necessarily liable for all the consequences, no employer of labour could be expected to face such a risk. And that is the contention of the pursuers. They say that the defenders must pay them compensation for their father's death, on the ground that the defenders employed a one-legged man to drive the engine, and that such a man must be presumed to be incompetent for the work. The Sheriff-Substitute does not think such a proposition is tenable. The pursuers produced a Fellow of the Royal College of Surgeons to give evidence about the effect of the loss of a limb on a man's powers, but it does not need a surgeon to prove that two legs are better than one. The proposition is incontestable. At the same time, a one-legged man or a one-armed man is often fit for work even of a kind that at first sight may seem to be beyond his powers. Every case must be dealt with on its own merits; and if that is to be the rule, and this case is to be dealt with thus, then it would probably be impossible to find in all Greenock an engine-driver regarding whom there is a more entire consensus of opinion to the effect that he is a trustworthy, capable, and skilful man in his work than there has been about Smith. The good opinion of his employers, the defenders, was shared in by the pursuers' own witnesses, the fellow-workmen of the deceased. He was long their favourite driver. They were all, including the deceased, quite accustomed to work with him, and there never was any hint or suggestion of his incompetency until the present action was raised. No doubt it appears that on the said occasion that gives rise to this action Smith made a mistake. But any man may do that, and it is quite clear on the evidence that the mistake was not the result of Smith's

physical deficiency; and that, even if he had been quite sound in all his limbs, he could not possibly have prevented the fatal result after the mistake was once made. The Sheriff-Substitute must therefore regard the selection of Smith for his post as a right selection. The fact that even such a careful and competent man as he could, once in a way, fail in his duty only shows the need that there is for the workmen to keep out from under the rising loads, and for the defenders to make certain that their orders to observe that precaution be not regarded as an unmeaning form. The pursuers also tried to make out that the winch was itself defective or in bad order. This attempt, however, failed most completely. It was shown by the best of all evidence, that of rival makers, that the winch was made by people famous for their winches, that it was of the best construction, and in perfect order, and the evidence to contradict all that was the opinion of a builder in Greenock, who has no special knowledge of such things at all. On the whole, the Sheriff-Substitute arrives, with the reluctance natural in the circumstances, at the conclusion that he is bound to find that the pursuers have failed to make out that the defenders are liable to them for their loss by their father's death. H. S."

SHERIFF COURT OF ABERDEENSHIRE.

Sheriff DOVE WILSON.

Employers' Liability Act—Damages £150.—This is an action at the instance of Alexander Fraser, labourer, Park Road, Aberdeen, the father of the young man Alexander Fraser, plumber, who was killed in the month of August last through the breaking of a rope while fitting up a lightning-conductor on the chimney-stalk of the defender's works at Westfield Steam Bakery.

It appeared from the proceedings that the apparatus required for the fitting up of the lightning-rod consisted of a block and pulley attached to a wooden beam that was laid across, and secured to the mouth of the chimney-stalk, and a rope fitted on to the block with a seat at the one end, by which the workman was suspended, and a counter-weight at the other, by which he was moved up and down. On Saturday, the 27th of August last, the deceased got upon the seat, taking the coil of conducting wire and his tools with him; and while being drawn up, and when within a few feet of the top of the chimney-stalk, which was about eighty feet high, the rope suddenly broke a little above the seat, and Fraser fell to the ground and was killed on the spot. The pursuer contended that, both at common law and under the Employers' Liability Act (sections 1st and 2nd), it was the duty of the defender to examine, or cause some proper person to examine, the rope in question, and that if he had done so the fault which caused the accident must have been discovered.

The defender, besides a general denial, pleaded that he was not liable, as the deceased was not his servant, but the journeyman of Mr. Calder Greig.

Sheriff Dove Wilson decided the case on 12th December, and we annex a copy of his judgment:—

"Aberdeen, 12th December 1881.—Having resumed consideration of the cause, Finds in fact that the deceased Alexander Fraser was at the time of his death engaged as a workman in the employment of the defender; that his death was caused by a defect in a rope provided by the defender, and used in his business; that this defect was not discovered owing to the negligence of the defender; and that it is not proved that the deceased took upon himself responsibility for the condition of the rope: Finds in law that, in terms of the Employers' Liability Act, 1880, section 1, sub-section 1, and section 2, sub-section 1, the defender is liable in damages; modifies the same at £150 sterling, and decerns against defender for that sum: Finds the pursuer entitled to expenses; allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report.
J. DOVE WILSON.

"Note.—The questions in dispute in this case are, firstly, whether at the time of the accident the relation of employer and workman subsisted between the defender and the deceased; secondly, whether the defect in the rope (which was the cause of the accident) was not discovered owing to the negligence of the defender; and thirdly, whether the deceased took upon himself the responsibility for the condition of the rope.

"1. The question whether the deceased was in the defender's employment is one of fact. The deceased was at the time in the regular employment of the witness Calder Greig, and it was by that witness that his wages were paid. If the question who paid his wages were conclusive, Greig was his master, but it seems to me impossible to dispute that, by the agreement of those concerned, a workman may for some particular bit of work cease to be in the employment of the person who pays him his wages, and may enter the employment of another person. There is nothing which makes it imperative to hold that the relation of employer and workman can subsist only between the employer and those to whom he directly makes payment of wages. The true criterion for distinguishing the employer in cases where there is room for doubt is not by whom the wages are paid, but who has the personal control and supervision of the work. If, therefore, the defender had the personal control and supervision at the time, it seems to me that the deceased must be taken to have been in his employment.

"The work at which the accident happened was being done in connection with a building of which the defender was his own architect and inspector. For the completion of the chimney in question, and the putting up of the lightning-conductor, a contractor had failed him, and he was completing the work by workmen whom he paid by time. For the fastening up of the lightning-conductor he applied to the deceased's master, the witness Greig. He had previously employed Greig about the building, and had an arrangement by which he paid him 7d. an hour for time, and the value of any materials he required. If Greig could not come he sent his man (the deceased), and the terms were the same. The defender wished Greig personally to undertake the putting up of the conductor, but Greig was unable to come, and offered to send the deceased, to which, after some objection, the defender agreed. All the plant and materials for the purpose were provided by the defender.

"In the doing of the work it is possible to consider that Greig had the superintendence, or that the deceased followed his own courses without special orders from any one, or that the defender acted as employer. The first alternative is out of the question, because on the day when the apparatus for raising the conductor was fixed Greig was not present at all, and on the day when the conductor was being put up he was there only for a portion of the time when his other work was done. The choice lies between regarding the deceased as his own master for the time, or regarding the defender as master. What makes me adopt the latter view is that the deceased was only one of several men who were engaged together on the work. These latter unquestionably were journeymen or labourers in the defender's employment, and received their orders from him, and unless the deceased was also working for the time under his orders, the work could not have gone on.

"2. The next question is, whether the defender was guilty of negligence in not discovering the defect in the rope. It seems to me that he was. Unless he had a proper knowledge of ropes, he had no business to furnish the rope in question for his men to use. In that case he should have placed the duty on some one who had knowledge; and if he had had experience in ropes, it appears from the evidence that he should have known that they are liable to have defects not apparent to the eye, but discoverable by the feel in a hand-over-hand examination. The rope in question had such a defect. The precise nature or origin of it is unknown, and is of no consequence. The rope had met with a 'nip,' or some accident, the result of which was that, though nothing was seen, it was so weak at a particular point that it gave way after some use on the day in question with about a sixth part of the weight it ought to have borne. I can find no evidence of any one having made a careful examination of the rope after it came into the defender's possession, and it seems hardly possible that with the rope in a state such that five-sixths of its strength were away, it would not, to a skilled examiner going over it bit by bit, have shown some unusual flexibility at the injured part. In a case where an accident meant almost certainly loss of life, the absence of a very careful examination prior to use was negligence.

"3. The next question is, whether the defender is relieved by the deceased having said, as it is proved that he did, that he would take all the responsibility. There is evidence that the defender, after he had seen the way the deceased had fixed up the tackle, was desirous of employing some one else of more experience to finish the work, and that the deceased pressed his services on him, and finally prevailed on him to allow him to continue, saying that he would accept all responsi-

bility. What did this mean? The cause of the discussion was the unskilful fastening by the deceased of part of the tackling; and what the parties must have been thinking of was the risk of accidents from the deceased's want of experience. It could not have been in the mind of either party that the deceased was to assume responsibility for the soundness of the plant supplied by the defender; and it would have been absurd for the deceased to have undertaken responsibility for the state of the rope—a matter about which he had, as the defender must well enough have known, no capacity of judging.

"If it had been proved that the deceased had been, or even had represented himself as being, a person with a knowledge of ropes, and that he had deliberately undertaken responsibility for the condition of the rope in question, I am not prepared to say that his relatives would have been entitled to found upon the Employers' Liability Act; but it is needless for me to enter on this question.

"4. The maximum amount of damages is by the Act (section 3) not to exceed three years' wages of a person in the same grade as the deceased, employed in the like employment, and in this district. The deceased at the time was a journeyman, and was earning 24s. a week, which were the ordinary wages for such a person. The sum awarded is under the amount of three years' wages at that rate, and cannot be considered excessive. During the greater part of the last three years the deceased was an apprentice, but it is the grade he occupied at the time of the accident which, according to the Act, must be taken as the criterion.

"J. D. W."

Notes of English, American, and Colonial Cases.

INJUNCTION.—Company—Similarity of name—Registration under Companies Act, 1862—Right of unregistered company to restrain registration—Intention to take business—Fraud.—A company not registered under the Companies Act, 1862, has, by virtue of the 21st section of that Act, no right or equity to restrain a second company from registering under the Act with a name similar to or even identical with the existing company. Where company B. had only temporary offices, and had not yet commenced business or registered under the Companies Act, 1862,—*Held*, that an injunction could not be granted at the instance of company A.—an existing company—to restrain company B. from carrying on their business so as to deceive, although company B. proposed to start with a name similar to that of company A.; on the ground that it was merely matter of opinion, and not of sufficient certainty for the purposes of an injunction, how company B. would carry on their business, and they might conduct it in such a manner as to show they did not intend to appropriate any part of company A.'s business. Leave to amend a writ will not in general be granted to raise an entirely new case of fraud.—*Hendriks v. Montagu*, 50 L. J. Rep. Ch. 257.

WILD BIRDS PROTECTION ACT, 1880 (43 and 44 Vict. c. 35), sec. 3—Foreign bird—Exemption from penalties.—The Wild Birds Protection Act, 1880, sec. 3, imposes a penalty on any person who shall shoot or take wild birds between the 1st of March and the 1st of August, or who "shall expose or offer for sale, or shall have in his control or possession after the 15th day of March, any wild bird recently killed or taken, . . . unless such person shall prove that the said wild bird was either killed or taken, or bought or received, during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom." The appellant, a poulterer, was summoned, under section 3, for having in his possession and exposing for sale some wild birds on the 18th of March 1881. He proved that he had bought them from S., a salesman in Leadenhall Market, who had bought and received them from a person residing out of the United Kingdom:—*Held*, that the appellant had not brought himself within the exemption clause, which contemplated a direct purchase or receipt from a person residing out of the United Kingdom.—*Taylor v. Rogers*, 50 L. J. Rep. M.C. 132.

INCOME TAX.—Foreign corporation with English agency—Telegraph company transmitting messages to foreign countries—16 and 17 Vict. c. 34, sec. 2, schedule D—

"Profits accruing from any trade exercised within the United Kingdom."—A foreign telegraph company had an agency in this country, and, besides cables and lines abroad, three marine cables with shore ends landed here, through which it despatched and received messages between this country and various parts of the world. The total charges for messages hence were paid by the senders, and the amount, after deduction by the Post Office, which received the charges in the first instance, of sums due to it on messages from or to this country, was paid to the agency, which in its turn retained the sum due to the company for the transmission of messages over the cables and lines of the company, and paid over the residue to various foreign governments and companies entitled thereto. The agency was assessed to income tax upon the profits of the company from the sums so received by it. Upon appeal by the agency from a confirmation of such assessment,—*Held*, that the company exercised a trade, employment, or vocation in the United Kingdom, within the meaning of 16 and 17 Vict. c. 34, schedule D, and that income tax was payable by the agency upon the profits accruing to the company therefrom.—*Erichsen v. Last*, 50 L. J. Rep. Q. B. 570.

*BASTARDY.—Affiliation order—Limiting duration of order—Marriage of mother—*35 and 36 Vict. c. 65 (*the Bastardy Laws Amendment Act*, 1872), *secs. 4 and 5*.—An affiliation order, in respect of a bastard child born after the passing of 35 and 36 Vict. c. 65 (*the Bastardy Laws Amendment Act*, 1872), contained, as drawn up, words whereby the weekly payment thereby ordered to be made by the putative father to the mother was to cease on marriage of the mother. The mother afterwards married, and the putative father thereupon discontinued the payment. Justices, upon complaint by the mother, under 35 and 36 Vict. c. 65, sec. 4, made an order for recovery of the payment:—*Held*, that such order was wrong, on the ground that the affiliation order as drawn up was alone to be looked to, and that the justices who made the affiliation order had discretionary power to limit the payment to the period to which the order, as drawn up, limited it.—*Pearson v. Heyes*, 50 L. J. Rep. M. C. 124.

MARINE INSURANCE.—Risk—Attachment of policy—Reinsurance—Effect of, where voyage covered by previous policy is completed.—The defendant underwrote a policy of insurance of goods on a voyage from Philadelphia to Rochfort, "lost or not lost," and he subsequently reinsured the same goods under a policy "lost or not lost," made with the plaintiff, and describing the same voyage. When the second policy was made the ship had already arrived in safety, and her cargo had been landed undamaged, though these facts were unknown to the plaintiff and defendant. In an action to recover a premium from the defendant as assured under the second policy, it was—*Held* (affirming the judgment of Lord Coleridge, C.J.), that when the second policy was made the defendant had an insurable interest in the subject-matter; that the policy attached to the risk of the voyage insured by the first policy, and therefore that the plaintiff was entitled to recover.—*Bradford v. Symondson* (App.) 50 L. J. Rep. Q. B. 582.

PARTNERSHIP.—Dissolution—Return of premium.—The plaintiff and defendant entered into partnership as solicitors for a term of twelve years, "the partnership to be determinable at the option of either partner" by giving three months' notice; and the plaintiff to have the option of increasing his share in the profits of the business upon payment to the defendant of £600. The plaintiff paid the premium of £600. Afterwards the defendant dissolved the partnership by giving a notice as provided by the articles:—*Held*, that the plaintiff was entitled to the return of a proportionate part of the premium.—*Rooke v. Nisbet*, 50 L. J. Rep. Ch. 588.

PARTNERSHIP.—Dissolution, action for—Equitable grounds—Date from which dissolution should commence.—Where partnership articles contain no provision for the dissolution of the partnership, and the intervention of the Court is sought to put an end to the partnership on purely equitable grounds, such as incompatibility of temper, and a dissolution is decreed, the dissolution will date from the date of the judgment.—*Lyon v. Tweddell* (App.) 50 L. J. Rep. Ch. 571.

PATENT.—Infringement—User of patented article—Agency.—J. S. & Co., a firm in London, acting for the occasion without remuneration as Custom House agents, on behalf of K. & Co., a firm in Cologne, took the necessary steps in clearing through the Custom House and obtaining the necessary warrants for enabling cargoes of lithofracteur, manufactured by K. & Co. at Cologne, to be discharged into lighters in the Thames for the purpose of being stored in K. & Co.'s warehouses.

This lithofracteur was manufactured by a process which was patented in this country by letters patent vested in the plaintiff company. On an action by the plaintiffs for damages, and an injunction against J. S. & Co. on the ground of user of the patented invention,—*Held* (reversing the decision of Bacon, V.C.), that the act of J. S. & Co., although it was one of the steps that must of necessity be taken before K. & Co. could discharge the cargoes, and (assuming that the trans-shipment and storage in K. & Co.'s warehouse was, having regard to the nature of the invention, a user of it within the meaning of the letters-patent) J. S. & Co. thereby assisted K. & Co. in infringing the patent, yet did not constitute any infringement on the part of J. S. & Co., nor was it an actionable wrong, and the action was dismissed with costs.—*Nobel's Explosive Co. v. Jones, Scott, & Co.* (App.) 50 L. J. Rep. Ch. 582.

The Court in dealing with agents in cases of this description has regard to the character of the agency—that is, the agency must be an agency in the making, using, exercising, or vending the patented invention.—*Ibid.*

COMPANY.—Winding up—Life assurance—Unregistered company—Jurisdiction—Liability of policyholders—Disputed claim—Evidence—Reduction of amount of contracts—Companies Act, 1862, sec. 91—Life Assurance Companies Act, 1870 (33 and 34 Vict. c. 61), secs. 2, 21, 22.—The holders of policies in mutual societies are not under any liability to contribute to the payment of any of the society's debts.—*In re The Great Britain Mutual Life Assur. Society* (App.) 51 L. J. Rep. Ch. 10.

The arrangement is that they shall pay the premiums on their policies and nothing more, but there is no obligation on the policyholder to continue such payments for premiums, as he may surrender his policy.—*Ibid.*

Therefore when such a company is wound up, the only matter for decision, subject to the payment of the costs of the liquidation, is in what proportion the funds of the society are to be divisible amongst the policyholders.—*Ibid.*

The Court has jurisdiction under section 21 of the Life Assurance Companies Act, 1870, to wind up an unregistered mutual life assurance society under the Companies Act, 1862.—*Ibid.*

When a society upon a winding-up petition disputes the claim upon a policy the *onus* of proof is on the society, and the society must bring forward a *prima facie* case which satisfies the Court that there is a question which ought to be tried.—*Ibid.*

A winding-up order had been made of a Mutual Life Assurance Society by Vice-Chancellor Hall. On the appeal, a committee of policyholders to a large amount desired the Court to exercise the power given by the 22nd section of the Act of 1870 of reducing the contracts of the society, instead of making a winding-up order. The Court discharged the winding-up order, as so long as it stood the power given by section 22 could not be exercised, and adjourned the appeal to allow a meeting of the policyholders to be called to decide whether the society should be wound up, or the contracts reduced.—*Ibid.*

FRIENDLY SOCIETY.—The Friendly Societies Act, 1875, sec. 16 (sub-sec. e)—Loan on personal security—Statutory prohibition.—The trustees of a friendly society are, by the Act of 1875, empowered with certain consents to lend the funds of their society on certain securities "not being personal security :"—*Held* (reversing Fry, J.), that such words did not constitute a statutory prohibition, and that when money had been lent by the trustees on personal security a claim could be enforced against the borrower in respect of such loan.—*In re Colman. Colman v. Colman* (App.) 51 L. J. Rep. Ch. 3.

PHARMACY ACT, 1868 (31 and 32 Vict. c. 121), sec. 17—Sale of poisons—Name and address of seller.—By section 17 of the Pharmacy Act, 1868, it is made "unlawful to sell any poison unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word 'poison,' and with the name and address of the seller of the poison." The respondent kept a shop and sold there upon commission a poison, which was labelled with the name and address of the person, a duly-qualified chemist, who supplied it to him, but not with his own name and address. The chemist who supplied him lived elsewhere, and had nothing to do with the sales in respondent's shop, beyond afterwards receiving the money realized, less the commission. On an information against the respondent under section 17,—*Held*, that he, having the control of the business of sale, was the seller, and must be convicted for not having his name and address on the label.—*Templeman v. Trafford*, 51 L. J. Rep. M. C. 4.

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A SKETCH OF THE HISTORY OF SCOTS LAW.

AN ADDRESS (IN PART) DELIVERED AT THE REQUEST OF THE MEMBERS OF
THE SOCIETY OF SCOTS LAW IN THE UNIVERSITY OF EDINBURGH, BY
Æ. J. G. MACKAY, ADVOCATE.

BEFORE James V. instituted the Court of Session in 1532 there was no system of jurisprudence to which the name of Scots Law could properly be applied.

The Local Courts of the Hereditary Sheriffs and Stewards, the Lords of Regality, Barons, and Burghs, in which their deputies or assessors presided, and the Circuit Courts of the Justiciar administered a law which, in so far as it related to land rights, was in the main the common Feudal Law of Europe, and in other departments was in a large measure arbitrary, although their decisions were to some extent founded upon a rudimentary customary or Common Law peculiar to Scotland.

The Parliamentary Committee of the Lords' Auditors and the Judicial Committee of the King's Council, which together formed the Supreme Civil Court, were bodies too variable in their members and too little independent of royal, ecclesiastical, and aristocratic influence to exercise an impartial control over the inferior tribunals, or to set an example by their decisions.

The Consistorial Courts of the Bishops, in which their officials presided, administered a law governing not only the most important personal relations of the family, but also many important rights relating to contracts and succession both testamentary and intestate, derived from the general Canon Law of the Roman Church slightly modified by provincial constitutions.

Although there were some general and some local customs which had acquired legal force, and James I. had introduced a certain uniformity into procedure by copying the briefs of the English

Chancery and instituting the first or ambulatory Court of Session, there was nothing corresponding to the strong foundations of the Common Law of England, which had been gradually formed since the Courts of Common Pleas, King's Bench, and Exchequer had been fixed at Westminster.

There was so little Statute Law that the whole of it deemed of permanent importance when the Scots Acts were first printed in 1566 is contained in scarcely more than two hundred pages of the duodecimo edition, and of these statutes it would be difficult to refer to more than a dozen which have descended to our time as an integral part of Scottish law.

There were no native Scottish law-books. The only legal treatises in existence—the “*Regiam Majestatem*,” “*Quoniam Attachiamenta*,” and “*Leges Burgorum*”—had been borrowed in whole or in large part from English sources prior to the War of Independence, at a time when there was no jealousy of England, and the customs of the Scottish Lowlands differed little from those of England. Throughout the Highlands, in Strathclyde and Galloway, the Scottish, unlike the Irish and Welsh Celts, had no collections of legal customs, and only fragments of their ancient usages had been preserved.

A foreign and half-dead language, Latin, was still used for three-fourths of law, including procedure and conveyancing.

There was no legal profession except that of notaries, a sort of cross between clergy and lawyers, who were admitted to their office after examination by the bishops,¹ and a small number of persons who acted on specially important occasions as prolocutors, or, as they were called in the more homely Scottish vernacular, “speakers for the cost,” because they took payment for their services, and came in the place of the armed bands of friends or retainers² who accompanied suitors to the Courts and criminals to the bar, to awe rather than persuade the judges. The only forms for legal documents were the Protocol-Books of the notaries,³ which contained similar collections of styles to the drafts now kept in the offices of law agents, and limited each to his own experience. There were no reported decisions, for there were no Courts of

¹ 1469, c. 31. By this Act it was declared that “in time to come no notar made by the Emperor's authority has faith in contracts civil within the realm,” and less directly the authority of the notaries appointed by the Pope was abrogated through the provision, “that full faith be given to the Papal notaries in *time bygone*.” See also 1503, c. 64, and “The Office of a Notary Public,” p. 10.

² Their numbers may be gathered from the Act 1555, c. 41, which provided that in criminal causes the pursuer should have only four and the defender six friends at the bar.

³ See papers by Mr. D. Laing and Mr. Thomas Thomson, in “Proceedings of the Society of Antiquaries for Scotland, 1859,” ii. p. 350, as to the Protocol-Books of notaries and Diocesan Registers of Glasgow Grampian Club, where the “*Liber Protocolorum M. Cuthberti Simonis, Notarii Publici et Scribæ Capituli, Glasguensis*,” A.D. 1499-1513, is printed.

sufficient learning or authority to make their judgments of value as precedents.

Through the want of certainty in the law and the non-existence of a Supreme Central Court, justice was often sacrificed in the Local Courts to the interest of the barons and landed men, and in the Ecclesiastical Courts to that of the bishops and clergy. This absence of a known and regular system of law, the abuses of the Courts both ecclesiastical and civil, and the venality of the Roman Curia, to which a ruinous appeal lay in consistorial causes, afforded a constant theme for the satire of the poets. Almost a century before the Reformation they had roused to indignant strains the usually gentle muse of Henryson. In the moral of his fable of "The Wolf and the Lamb" he describes as amongst the "three kind of wolfis in the world"—

"The first ar false perverteris of the lawis,
Quilk under polit termis falset mingis,
Lettand that all were gospel that he schaws,
But for a bud the poor man he o'erthraws,
Smoirand the right, garrand the wrang proceed,
Of sic Wolfis hellis-fire shall be thair meid."

In another of his fables the process before the Consistory Court and the practice of arbitration, which excluded appeal, are held up to ridicule.

The *Sheep* is sued by the *Dog* for a loaf of the value of four shillings before the *Wolf* as judge in the Consistory Court, who has the *Raven* as his apparitor, and the *Tod* (fox) as his clerk and notary, the *Gled* (hawk) and the *Graip* (vulture) being the advocates. The *Sheep* declines the *Wolf* as a suspect judge, all the members of whose Court, "assessouris, clerk, and advocates, to me and mine are enemies mortal;" and this declinature is referred to the *Bear* and the *Brok* (badger) as arbiters, who of course decide against the poor *Sheep*, and the *Wolf*, having been thus established as a competent judge, gives decree in favour of the *Dog*, to satisfy whose claim the *Sheep* has to sell his fleece.

The morality of the fable transfers the satire from the ecclesiastical to the civil Courts, which Lord Hailes thinks was because Henryson "stood more in awe of the court spiritual than of the temporal," but probably he wished to censure both. In this explanation the *Sheep* represents

"The figure
"Of pure Commounis that daylie ar opprest
Be turrane men quhilkis settis all thair lure
Be false meinis to mak ane wrang conquest,
In hope this present lyfe suld ever lest.

This *Wolf* I likkin to ane Schiref stout,
Quhilc byis ane forfalt at the Kingis hand,
And hes with him ane cursit Asyis about,
And dytis all the pure men up-on land.

The *Ravin* I likkin to ane fals Crownair,
 Quhilk hes ane porteous of the indytement,
 And passes furth befor the Justice Air,
 All misdoaris to bring to jugement,
 But luke gif he wes of ane trew intent,
 To scraip out Johne and wryte in Will or Wat,
 And swa ane bud at baith the parties tak."

As to the *Tod* (fox) and the *Gled* (hawk), Henryson thinks it unnecessary to trace the subject of the allegory.

All this is satire, but it is satire whose meaning is that the whole system of judicature then existing in Scotland was corrupt, and satire, while it may exaggerate, does not speak in such tones against a particular class of the community without foundation. Lawyers, it has been said, are never popular, and justice, not popularity, should be their constant aim; but where it is their aim, they will not be condemned even by the popular verdict of which such a poem is the mouthpiece.

The voice of Henryson was not powerful enough, or too early for reform, but it moved the spirit of the poet of the next generation, whose verse co-operated with the prose of Knox in producing the Reformation. No longer using the disguise of fable, Sir David Lyndsay denounces in language almost too plain for poetry the iniquities of the law and its administrators.

In his account of "The Maner quhow Christ sall cum to His Jugement" he wrote:¹—

"With Judas sall compeir ane clan
 Of fals tratouris to God and man.

Thare salbe sene the fraudfull failyeis
 Of Schireffis, Provestis, and of Bailyeis;
 Officiallis, with thare Constry clerkis,
 Sall mak compt of thare wrangous werkis,
 Thay, and thare pervers Procuratouris,
 Oppressouris boith of ryche and puris,
 Throw delatouris full of dissait,
 Quhilk mony one gart beg thare meit.

That day sall pas be Peremptouris,
 Without cawteill or dillatoris;
 No Duplicandum, nor Triplicandum,
 But schortlye pas to Sentenciandum,
 Without continuatiounis,
 Or any appellatiounis."

His account of a Consistory suit by a pauper is evidently drawn from the life:²—

"*Pauper.*

Marie! I lent my gossop my mear, to fetch hame coills,
 And he hir drounit into the Querrell hollis:
 And I ran to the Consistorie, for to pleinze,
 And thair I happinit amang ane greidie meinze.

¹ "Ane Dialog betuix Experience and ane Courteour," Works, ii. p. 84.

² "Ane Satyre of the Thrie Estaitis," Works, ii. p. 248.

Thay gave me first ane thing, thay call *Citandum*,
 Within aucht dais, I gat bot *Lybellandum*,
 Within ane moneth, I gat *ad Opponendum*,
 In half ane yeir, I gat *Interloquendum*,
 And syne, I gat, how call ye it, *ad Replicandum* :
 Bot, I could never ane word yit understand him ;
 And than, thay gart me cast out many plackis,
 And gart me pay for four-and-twentie actis :
 Bot, or thay came half gait to *Concludendum*,
 The Feind ane plack was left for to defend him.
 Thus, thay posponit me twa yeir, with thair traine,
 Syne, *Hodie ad octo*, bad me cum againe :
 And than, thir ruiks, thay roupit wonder fast,
 For sentence silver, thay cryit at the last.
 Of *Pronunciandum*, thay maid me wonder faine ;
 Bot I got never my gude gray meir againe.

Temporalitie.

My Lords, we man reforme thir Consistory lawis,
 Quhais great defame, above the heavins blawis."

It had become evident, as the poems show from which the above quotations have been made, that a Reformation in Law was almost as urgent as a Reformation in Religion. Indeed, so close a hand did the clergy of mediæval Papal Rome, like the augurs of the earlier days of Pagan Rome, keep on legal procedure, that the two reforms could not be far distant from each other. The clear-sighted common-sense of Lyndsay, in whom was concentrated that peculiar form of wisdom by some supposed to be characteristic of his nation, divined what as regards law were the necessary remedies. He recommended that the laws should be written in the vulgar tongue:—

"I wald sum Prince of gret discretioun,
 In vulgare language planelye gart translait
 The neidfull Lawis of this Regioun:
 Than wald thare nocht be half so gret debait
 Amang us peple of the law estait.
 Geve every man the verytie did knaw,
 We nedit nocht to treit thir Men of law.

Latt Poetis schaw thare glorious ingyne,
 As ever thay pleis, in Greik or in Latyne ;
 Bot lat us haif the Bukis necessare
 To Commoun weill and our Salvatioun
 Justlye translatit in our toun Vulgare."¹

He condemned the appeal to Rome, and insisted that there should be a strong and learned Supreme Court within Scotland itself. He foreshadowed, if indeed he did not already know, the exact form which the Court of Session was to assume, although he suggested, what was fortunately not carried out, a second or Northern Court sitting at Inverness or Elgin:—

"Into the North, saxeine sall thair remaine,
 Saxtein richt sa, in our maist famous Toun
 Of Edinburgh, to serve our Sovereaine ;

¹ "Ane Dialog betuix Experience and ane Courteour," Works, i. p. 152.

Chosen without partiall affectioun
 Of the maist cunning clarks of this region:
 Thair Chancellor chosen of ane famous clark,
 Ane cunning man of great perfectioun,
 And for his pensioun have ane thowsand mark.”¹

Attempts to found a Central Supreme Court had already been made in the Session of James I. and the Daily Council of James IV., but the successful establishment of a permanent order of justice is the best title to fame of Lyndsay's royal pupil, who had learned from him more than

“To mute
 Pa Da Lyn upon the lute.”

Three hundred and fifty years have all but elapsed from the memorable day commemorated in the window of the Parliament House in Edinburgh, when in the old Tolbooth, in presence of the young king and Dunbar, Archbishop of Glasgow, his chief counsellor, the first judges of the Court of Session, seven of the Spiritual and seven of the Temporal Estate, with Mylne, Abbot of Cambuskenneth, as their President, swore to do justice to all the king's lieges,² received authority to frame rules of procedure, and an assignation under a Bull of Paul VII.³ to ten thousand ducats of gold out of the ecclesiastical revenues for their support.

Each of the half centuries which followed forms a marked and convenient stage in the history of the law of Scotland.

Only seven generations of an ordinary span of human life have passed since then, yet how vast the change from the time when an abbot of Cambuskenneth presided over the senators of the College of Justice. Still, numerous as have been the alterations in the substance of the law, in forms of procedure, and in the composition and character of the Court, the College which King and Pope combined to found in answer to the desire of the nation, has, in spite of shortcomings and some grave errors, been not merely the symbol but the true representative of justice for Scotland.

Its order has been thus far permanent, because it was devised by able statesmen and guided by learned lawyers, but above all because it has accepted the necessary changes incident to human institutions.

The first half century of its existence (1532-1582) was the period of the Reformation in Scotland. During it were transacted the tragedies in which Mary and Rizzio, Darnley and Bothwell, Murray and Knox were the chief actors, and which still draw, as they then drew, the eager eyes of the world to Holyrood and the Kirk-o'-Field. It was a time of ruthless shameless crime, when murder

¹ “Ane Satyre of the Thrie Estaitis,” Works, ii. p. 283.

² 1532, c. 36. A. P. ii. 335.

³ This Bull, dated 15th September 1531, is printed in Acts of Sederunt 1532-1553, Appendix, p. 85.

and adultery were familiar guests in the palaces of kings, and even judicial robes were stained with blood. One who became President of the Court is believed to have drawn the bond for Darnley's assassination. But the passions which vented themselves in these terrible deeds did not stay the progress of the civil, though they baffled the powers of the criminal, law.

The form of the Court, which James V. moulded in part from the model of the French Parliaments, in part from the native models of the Session of James I. and Daily Council of James IV., was a compromise. A reformer before the Reformation, he attempted to reform the Law before the Church was reformed, and his work, though good, was necessarily incomplete. To conciliate the clergy, and in part owing to the absence of other lawyers, he admitted their order to half of the judicial power and the office of President, and he left untouched the consistorial jurisdiction.

To conciliate the barons he introduced into the Court the Extraordinary Lords to the number of three or four, and he did not interfere directly with the rights of local heritable jurisdiction. It was fortunate that alongside of the Court there was laid the foundation of another body, the Faculty of Advocates or lay lawyers, ten of whom were admitted by the rules of the judges as general procurators before the Court. This Faculty was destined to play a great part in the future history of the law, and in the persons of some of its members in the political progress of Scotland.

If, like all corporations, and indeed like all separate classes of the community, it has sometimes shown a tendency to regard its privileges or its profits rather than the common good, the circumstances of its origin must always recall it to its duty; for the Bar was brought into existence for the benefit of the lieges against the oppressions and injustice of the nobles and landowners, and of the clerical caste. In Scotland, as in France, there existed for several centuries a "Noblesse de Robe," which in most cases did not forget the fine proverb of feudalism, "Noblesse oblige."

The Reformation in the succeeding reign, which bears the name of Mary, and during the minority of her son, when the real rulers were the regents, nobles, and ministers of the Protestant party, imposed a further restraint upon the ecclesiastical jurisdiction, and introduced the lay element to a larger share in the judicature.

The instructions which were issued to the Commissaries of the queen, who succeeded to the officials of the bishops in 1563, gave an appeal from the inferior Commissariots to the Commissaries of Edinburgh, and from these to the Court of Session, which under James received the name of the King's Great Consistory. They also directed that the Lords of Session should be the executors of intestates instead of the bishops; and besides many other improvements in procedure and reduction of exorbitant fees, declared in a sweeping sentence "that the summones, hails, processes, and sentences be in the vulgar tongue."

An Act was passed in 1584¹ which prohibited all clergymen from holding judicial office, including that of judge of the Court of Session, on the pain of deprivation of their benefices; but this reform was checked on the restoration of Episcopacy in 1606, and only fully carried out a century later. The employment of the novel art of printing for the publication of the law, and in connection with it the projects of digesting and codifying the crude and ill-arranged manuscript collections then in use, led to the appointment of two commissions. One was issued in 1566 by Queen Mary, over which Lesly, Bishop of Ross, and Sir James Balfour presided, "to examine the books of the law, and set them forth to the knowledge of the subjects," which resulted in the publication of the first complete edition of the statutes in the same year. The other was appointed in 1574 by the Regent Morton² to reduce the laws "into a more easy form and method," a task chiefly intrusted to Balfour and Sir John Skene, the Lord Clerk Register.³

This as a public work proved abortive through the termination of Morton's regency, but bore fruit in the collection known as Balfour's "Practicks,"⁴ and the edition of the Statute Law prior to James I., published by Skene in August 1607,⁵ along with the "*Regiam Majestatem*" and "*Quoniam Attachiamenta*," and other old laws, with a translation out of the Latin by command of James VI.

Though the attempt at a scientific digest or code was premature, and the haste with which the work was accomplished forbade its being other than imperfect, the immediate practical aim was secured. The law of Scotland was no longer a mystery written in Latin and hidden in manuscripts which were accessible only to the clergy and the rich. It was still far from plain and required interpreters, but it was now in the hands of the people. If the lay profession devoted to its practice should ever seek to make it a mystery or oppose its improvement, the people could understand and defeat the attempt.

Whoever supposes, as some writers have done, that Scotland will submit to be either a priest-ridden or a lawyer-ridden country, mistakes transient external symptoms for the deep-seated character of its inhabitants.

The people of Scotland have since this time firmly held that law as well as religion is for the people and not for any caste or class. It can scarcely be supposed that this conviction will not have consequences in the future progress as it has had in the past history of the law.

The permanent additions to the Statute Law during the first period of the Court's existence were not numerous.

¹ 1584, c. 133.

² See as to these commissions, Mr. Thomson, the Deputy Clerk Register's, Fourth Report (1810), pp. 19, 20.

³ History of House of Douglas and Angus, p. 358.

⁴ The earliest MS. extant is of 1600.

⁵ See as to this, Deputy Clerk Register's Fourth Report, pp. 21, 22.

The most important were the necessary changes consequent on the substitution of a national Protestant and non-Episcopal, though scarcely yet Presbyterian, form of church government for the Papal and Episcopal; but these were in part temporary, as Episcopacy was three times restored for short intervals—from 1572 to 1592, from 1606 to 1638, and from 1662 to the Revolution Settlement in 1689. But the severance from Rome was complete, and affected the law as vitally as the religion of Scotland.

A statute¹ was passed declaring the canon and civil laws, so far as contrary to the Protestant religion, to be null. Since then the canon law declined in authority, and although institutions, such as the law of marriage, which had passed from the canon into the common law of Scotland, were retained, its use in the Courts became rare, and it ceased to have practical influence on the development of Scottish jurisprudence.

The point of departure is marked by the substitution of the Court of Session for the bishops as the authority for the examination of notaries,² the institution of Royal Commissaries in place of the bishops' officials, the introduction of a new ground of divorce for desertion,³ and the new regulations made with regard to the guardianship of minors.⁴ The Roman civil law, on the other hand, which contained little that was repugnant to the new form of church government, rather gained than lost in authority by the discredit of the canon, and continuing to form the basis of the education of Scottish lawyers, it retained an important place amongst the sources of jurisprudence until it was in recent times supplanted by the precedents of English equity and commercial law, which can be more easily and safely applied to the circumstances of modern life than the responses of Roman juriconsults, the edicts of the prætor, or the rescripts of the Emperors of the East or West. London is a good deal nearer to Scotland than either Rome or Constantinople.

The moral side of the Reformation was reflected in the Acts against fornication,⁵ adultery,⁶ bigamy,⁷ and incest,⁸ and in the statute⁹ for the punishment of strong and idle beggars, and the relief of the poor and impotent, the beginning of the Scottish Poor Law.

One branch of the law of which Scottish lawyers are justly proud, the method of exact conveyancing, which establishes the faith of deeds and gives security to land rights, may also be traced in the statutes of this time, although its perfection was due to the lawyers of the two generations which followed.

Subscription before witnesses was substituted for seals as the

¹ 1567, c. 31.

² 1540, c. 76; 1540, c. 78; 1540, c. 81; 1551, c. 24; 1555, c. 43; 1563, c. 78 and 79.

³ 1573, c. 55.

⁴ 1555, c. 35; 1555, c. 18.

⁵ 1567, c. 13.

⁶ 1563, c. 74.

⁷ 1551, c. 19.

⁸ 1567, c. 14.

⁹ 1579, c. 74.

legal attestation of the authenticity of documents.¹ Sealing was dispensed with when writs were registered in the books of Council and Session.² Registration was introduced for inhibitions and letters of interdiction.³

The new Court, as might have been anticipated, was vigorous in its action, anxious to justify its existence, and to ensure its continuance. The regulations for procedure made by its first judges display great sagacity in the arrangements for calling causes in a fixed order, and for the proper conduct of debates. They were deemed of so much importance as to be ratified by Parliament⁴ and inserted amongst its Acts.

Several of the Acts of Sederunt which follow show the Court aimed at a jurisdiction beyond what we now consider appropriate to a judicial body, and analogous to that exercised by the Parliament of Paris, as in the registration of treaties, the summoning of meetings of the Estates of the realm,⁵ the suppression of Lutheran writings,⁶ and even the imposition of local taxes.

There are also some laudable provisions, as one in favour of advocates for the poor⁷ and their salaries, another authorizing an advocate to appear against the king,⁸ and a third against soliciting judges.⁹

The value of the judgments of the Supreme Court as precedents was recognised from its commencement. In this respect it followed the instinct of the Anglo-Saxon race, and the example of England rather than the French or Continental practice, by which the *arrêts* of the Courts, though not entirely ignored, have always possessed inferior authority, and imperial or royal ordinances have early attempted a premature codification of the law.

What Bentham has called by an unfairly disparaging epithet, judge-made law, has always been a leading source of Scottish jurisprudence, although it may be noticed that the precedents being fewer in number, recourse has more often been made to legal principles in Scotland than in England. Scotland, in fact, occupied an intermediate position between those parts of the Continent where the Roman law was entirely accepted, and there was therefore less need to apply general principles to particular cases by decision, and England where that law was almost entirely rejected, and a new common law had to be developed by judicial opinions and judgments.

James V. ordered a journal of the decisions of the Court to be kept, and this practice, begun by Sinclair, Dean of Restalrig, one of the early Presidents, has been continuously followed, at first by certain of the judges and advocates, afterwards by reporters

¹ 1540, c. 117 ; 1555, c. 3 ; 1555, c. 29 ; 1563, c. 81 ; 1579, c. 80.

² 1584, c. 4. ³ 1581, c. 119.

⁴ 1540, c. 93.

⁵ A. S. Nov. 16, 1537.

⁶ A. S. May 8, 1534.

⁷ A. S. March 2, 1534 ; April 27, 1535.

⁸ A. S. Nov. 22, 1537.

⁹ A. S. July 4, 1536.

appointed by the Faculty of Advocates, and latterly by private enterprise.¹

A general view of the law as it stood at the close of this period may be gathered from the "Practicks," which bear the name of Balfour, and are probably partly his work, and from the "Jus Feudale" of Sir Thomas Craig.

These treatises, although now of little practical value, were the chief guides of Scottish lawyers until they were superseded by the works of Lord Stair and Sir George Mackenzie.

A comparison of Balfour with Craig shows that while the feudal law, which regulated all rights relating to land, was a well-digested and arranged system, the legal expression of the form of government based on the ownership of land, with little in it specially Scottish, the remainder of the law was a chaotic mass derived from the most heterogeneous sources. It consisted of principles borrowed from the civil and the canon laws, customs and procedure introduced from England and from France, of native Saxon, or, in a very few instances, of Celtic origin, intermingled with the imperfectly recorded practice of the old Session and Daily Council, the Lords' Auditors and King's Council, the Courts of the Justiciar, Chamberlain, and Admiral, the old Consistories and the new Commissariots.

Into this wilderness of precedents the Court of Session was slowly but surely introducing a more settled and uniform law, and a regular method of procedure.

The second half century of our survey, from 1582 to 1632, was a period of comparative calm, between the Reformation and the Rebellion, the religious and the civil revolution.

Scotland did not, like England, revert even for a short time to the old faith, nor did it accept a form of church government in which the King took the place of the Pope, and the Bishops were left standing as ecclesiastical lords, but its rulers a second time restored Episcopacy, contrary to the wishes of a majority of the people. Through the union of the crowns it lost the personal presence of the monarch, and of that portion of the aristocracy which followed the Court, and it acquired the more democratic tendencies both in Church and State which it has since retained.

The law during this period, and for the rest of the seventeenth century, was identified with the Crown, and the Court of Session too, subject to royal influence, and exercising often a repressive and arbitrary jurisdiction, was looked on with suspicion. If Craig expressed the opinion of lawyers when he declared that its forms of procedure surpassed those of any other nation, Buchanan more truly represented the popular verdict in denouncing it as an institution by which the property of every citizen was committed to the arbitrary will of fifteen men who possessed an almost tyrannical power. While the latter view is an exaggeration, it is proper to keep in view that

¹ Memoir of Lord Stair, pp. 191, 192.

the Court of Session, though its establishment was a much-needed reform, in so far as it introduced a settled system of jurisprudence and repressed the abuses of the baronial and ecclesiastical Courts, had from its commencement some anti-popular features which were innovations on the older customs.

It gradually superseded trial by jury in all civil cases. It conducted its deliberations with closed doors. The equity it administered under the name of *nobile officium* might readily be mistaken, and in bad hands might readily become another name for arbitrary law. Its judges, who held their office from and at the pleasure of the king, were suspected, sometimes with truth, of bending justice in his favour. Bribery was in that and the succeeding generation an almost tolerated judicial, and not, as it afterwards became, merely an electioneering and parliamentary, vice.

During the whole of the seventeenth century we are met by the singular phenomenon that the law made steady progress in spite of the corruption of its administrators. This has led some to maintain the profligate paradox, that legal reforms are more generally and easily accomplished in bad than in good times, by despotic than by popular governments.

The truth is that the effect of the sum-total of men's actions is determined in general by their ordinary conduct, not by their worst acts; and if we find improvements in the law sometimes carried out by those who would have preferred to remain stationary, we must remember that legislators and lawyers are to a large extent not independent actors, but agents who cannot resist the tendencies of the age.

The Statute-Book in this period received an important addition in the Act requiring the insertion of the writer's name in deeds;¹ the Act² for registration of sasines on pain of nullity, the foundation of the system of registration of land rights; the Acts of the long prescription³ and the vicennial prescription of services;⁴ the Act against alienations by bankrupts,⁵ the commencement of our bankruptcy law; and just a year after the close of this period, the series of legislative or quasi-legislative measures for the valuation of teinds.⁶

Two other projects of this time—the one at once successful, the other still unfulfilled—proceeded from the king and his Council, and were perhaps more important even than these great statutes.

By an Act of the Privy Council in 1616 a leading idea of the Reformers was realized, and there was established in every parish, at the expense of the parishioners, the parochial school, which was destined to educate for so many generations all classes of our countrymen, if not in the higher classical learning of scholars, at least in those branches which were of immediate practical use in the ordinary business of life.

¹ 1593, c. 179. ² 1617, c. 16. ³ 1617, c. 12. ⁴ 1617, c. 13. ⁵ 1621, c. 18.

⁶ 1633, c. 19, and see the Submissions in Scots Acts, ii. p. 87-110.

The other project, which failed for the time notwithstanding the zeal with which James and some of his ablest advisers urged it, was the completion of the union of the crowns by an incorporating union of the Parliaments and the Laws of the two kingdoms. The troubles of the following century, the jealousy of the two nations, fomented rather than allayed by the accession of the Scottish king to the English throne, delayed the Parliamentary union until it was accomplished by the wise policy of the statesmen of Queen Anne. Who are the statesmen of the future for whom is reserved the crowning honour of a union of the laws?

As the condition of Scottish law at the middle of the first half century after the institution of the Court is represented by Balfour and Craig, so, though with less precision, we can mark its state at its close in the "Practicks" of Sir Thomas Hope, the Lord Advocate, and of Sir Robert Spottiswoode, one of the presidents under Charles I. Both of these are imperfect and disjointed works, which have been brushed aside into the antiquarian department of law, that limbo in which so many ghosts wander, by the more important labours of the next generation of lawyers.

There is one point in the history of the law for which they will always require to be referred to. It has been sometimes supposed that the Act of 1685 first introduced the strict entail. It is true the statute first gave legal sanction to the fetters which protected the estate from creditors, and enabled the Scottish tailzie to withstand down to our time the advancing tide of mercantile jurisprudence. But for several centuries before 1685 there had been an inveterate custom, derived from feudal necessities, of altering the natural order of succession.

The lawyers of the beginning of the seventeenth century were busily employed in drawing bonds and contracts to prevent the defeat of the will of makers of tailzies, even in the most remote future that could be contemplated, by the treason, crime, or extravagance of any of the succeeding heirs. They left little more to be done by Parliament than to embody in an Act the ingenious devices of prohibitory, irritant, and resolute clauses which it required the subtlety of the lawyers of the eighteenth and first half of the present century to break through in isolated cases, leaving it to those of our own time to give effect to the opinion of Lord Stair, "that the perpetuities of estates, where they have been long accustomed, have sufficiently manifested their inconvenience."

The third period of the history of the law, which it is convenient to extend by a few years to the Revolution Settlement (1632-1689), was the time of the civil wars, or troubles as they were called in Scotland by, a phrase which scarcely expresses their full character. Open or secret civil war was continuous during the whole period, for even the interval of comparative tranquillity between the Restoration and 1688 had its plots and rebellions and treason trials.

The political movement of this half century is too crowded with events for a brief summary, yet such must be attempted to indicate the movement of the time.

The monarchy abolished and the king executed, the republic for a brief interval established by force of arms and the political genius of Cromwell, the monarchy restored in Scotland unfortunately without the limitations which accompanied the English restoration, and as a consequence Scotland a second time made the field of the arbitrary government which led to the Second Revolution, the Covenanters establishing Presbyterianism as the form of church government, Charles II. restoring Episcopacy, and William III. re-establishing the Presbyterian Church in Scotland. Such were some of the changes which Stair, and the lawyers who were his contemporaries, witnessed and took part in.

One judge of the Court of Session perished on the scaffold for his devotion to the Monarchy, while another met the same fate for his adherence to the Covenant. Several lost their office for refusing Cromwell's tender, and others for declining to take the test. Stair himself was outlawed for treason to James VII., and saved his life by voluntary exile. Sir George Mackenzie was forced into retirement by the triumph of the Revolution, which placed Stair for a second time in the President's chair.

But in spite of, or perhaps we should rather say because of, these vicissitudes of fortune which trained the intellects of men in a life-and-death struggle between the opposing principles of despotic and constitutional government, and not in the petty contests for office and emoluments of ordinary times, this was the golden era of Scottish lawyers, and the most important stage in the history of Scottish law.

As there are periods which produce great poets, or great philosophers, or great historians, so this was a time in Scotland fertile in great lawyers. If Stair stands prominent in the eyes of posterity because his fame is preserved by his *Institutions*, Nicolson, Gilmour, and Nisbet, Lockhart, Fountainhall, and Mackenzie were his superiors as advocates, and some of them, at least, his equals as legislators and judges.

Through the joint effect of legislative and judicial action the law of Scotland emerged at the close of this period not a perfect or permanent, but a complete system, which, while its composite origin in the civil, canon, feudal, English, French, Scottish customary and Scottish statutory law was not concealed, had a character of its own and a consistency in its parts and in their relation to the whole.

The era of a code which had been dreamt of at the Reformation was indefinitely postponed, but the Scottish practising lawyer had now in Stair's *Institutions* a work better arranged than the *Pandects*, and in Mackenzie's *Institutes* a plainer guide for the student than in those of Justinian.

It was not unimportant that when the Parliament migrated from the Tolbooth in 1639 to the present Parliament House the Court accompanied it. Thus the association between the legislative and judicial bodies continued, and indeed became more intimate; for the Parliament now met always, and not, as in earlier times, only when most convenient, in Edinburgh, the undisputed capital of the kingdom.

The judges of the Court of Session had besides their judicial duties seats in the Scottish Parliament, where the leading advocates were generally to be found amongst the representatives of the Commons. Acts of Sederunt of the Court often formed the basis of Acts of Parliament, and the laws were made under the supervision of those who were to administer them. It can scarcely be doubted that they owed their comparative excellence—that brevity and propriety of speech which extorted the admiration of Bacon, even at the time he was scheming for their abolition—in a large measure to this connection.

The principal statutes of this period are of great importance. They put, as it were, the finishing touches on Scottish jurisprudence before it became subject to English influence, and, while remaining a separate system, lost its self-originating legislative power.

The statutes made between the Rebellion and the Restoration were rescinded, and so passed out of the law, except as a memorial of the past, and an example for the course of some future legislation. The radical reforms of Cromwell in the form and procedure of the Courts in Scotland, the introduction of English judges into the Supreme Court, the establishment of a Court of Bankruptcy or Sequestration at Leith, and of the local Baron Courts, and Courts of Justice of the Peace throughout the country, were all, except the last, transitory, because, although for the most part wise, they were premature reforms. It is worthy of notice that while the Protector abolished the use of Latin in charters, this practice was renewed at the Restoration,¹ and only finally ceased in 1847.

Two centuries were thus required to accomplish this simple reform which the usurper effected during his brief rule of six years, and which Lyndsay, even a hundred years before, had declared to be necessary. So strong is the conservative tendency of lawyers. So rare is the union of the foresight of the reformer's eye with the strength of the reformer's hand.

After the Restoration the Parliament of Scotland was active in legislation, and if it was of a humbler character than that of Cromwell, dealing with parts, and often small parts of the law, instead of its whole scope and method of administration, the authors of this legislation may at least claim that they were practically successful for the time, while Cromwell's laws serve only as an example to the future of the fate of premature reforms.

The commencement was made of the legislation which conferred an exclusive jurisdiction upon the local Courts to the great relief

¹ A. S. 1661, c. 73.

of the poorer classes although afterwards carried to excess, by disallowing advocations the ordinary mode of appeal to the Court of Session in cases below the value of 200 merks.¹

The forms of procedure in all the Superior Courts, criminal as well as civil, were much improved by the very carefully considered Act concerning the regulation² of the judicatories, the work of a Commission issued in 1670, and a particular abuse was checked somewhat later by the statutes requiring the signature of interlocutors.³ The extreme length of the long negative prescription of forty years, which had already been curtailed as regards merchants' accounts, servants' fees, and house-rents by the Triennial Prescription Act of 1579,⁴ received another important limitation by the Quinquennial Prescription Act of 1669,⁵ which applies to all bargains relating to moveables that can be proved by witnesses, as well as ministers' stipends. The law as to the subscription of deeds was amended and consolidated by the statute,⁶ of which Stair was the author, and the testing clause assumed the form so familiar to Scottish lawyers that it may seem treason in one of them to suggest that it admits of simplification, and that the unfortunate sanction of the practice of filling it up *ex post facto* sometimes lends itself to purposes of fraud. The system of registration for the purpose of publication, to which the Lord Clerk Register and leading lawyers of the time paid close attention, was brought to singular perfection by a series of Acts, especially by one which made the priority of rights in land depend on priority of registration.⁷

The clumsy rolls, which had grown in length to a most inconvenient size, were superseded by allowing deeds to be written bookways,⁸ an improvement generally followed, which makes our Scottish law papers more easy to handle than the cumbrous documents miscalled briefs in England.

Careful provision was made to protect the estates of pupils and minors by requiring their tutors and curators to make up inventories.⁹

The attachment and sale of land for debt was facilitated and made more equitable by the introduction, first by the Court and afterwards by statute, of adjudication in place of appraising,¹⁰ and of the process of judicial sale.¹¹ The forms of execution against moveable estate were in like manner regulated.¹²

The Entail Statute¹³ may be looked on as the culmination of the legislation of the last Stewart kings; but it, as already noticed, only clothed with definite legal sanction the clauses already invented by lawyers. Its main object was the preservation of families,

¹ 1663, c. 9.

² 1672, c. 16.

³ 1686, c. 3; 1693, c. 18.

⁴ 1579, c. 83.

⁵ 1669, c. 9; 1685, c. 14.

⁶ 1681, c. 5.

⁷ 1681, c. 11; 1685, c. 38; 1686, c. 19; and after the Revolution, 1693, c. 13, 14, and 15; 1696, c. 18 and 39; 1698, c. 4.

⁸ 1686, c. 17; 1696, c. 15.

⁹ 1672, c. 2.

¹⁰ 1672, c. 19.

¹¹ 1681, c. 17.

¹² 1661, c. 51; 1672, c. 8 (Arrestments); 1669, c. 4 (Poindings). ¹³ 1681, c. 5.

a leading inclination of human nature, but specially strong in Scottish human nature, and this inclination was stimulated by the difficulty of gratifying it in such revolutionary times.

The great work of Stair, of which the first edition was published in 1681, presents us with the sum of pure Scottish jurisprudence as it stood at the close of this period; but he fortunately survived to include in the second edition, which appeared twelve years later, some of the effects of the Revolution Settlement.

After the close of the seventeenth century it becomes difficult to disentangle what is English or British from what is Scottish in the history of our law, for though it continued an independent development in the decisions of the Courts and the writings of legal authors, its foundations as well as its superstructure were sapped and assailed by British statutes, by Acts of the British Parliament applicable to Scotland, by decisions on appeal of a House of Lords until recently exclusively composed of English lawyers, and by the indirect influence of the judgments of English Courts. That it has stood this protracted siege for nearly two centuries is due to the excellence of the principles extracted from the Roman jurisprudence, to the practical common-sense of the old Scottish statutes, and to the legal learning of the judges of the Court of Session.

When the union of the laws is made, as made it must be, it ought for the same reasons to be made on honourable and fair terms.

If the people of the two countries are wise, as when the crowns were united the Scottish monarch ascended the British throne, so when the time comes for the union of the laws, many principles and some parts of Scottish jurisprudence will pass into the future British Code.

Having elsewhere examined the Institutions of Stair in detail, it is here only necessary to mention that as regards the system of land rights being founded on the feudal law, they have become already in large measure, and will soon be almost entirely antiquated.

In treating of particular mercantile contracts, Stair's treatise was necessarily imperfect from the first, for Scotland was not then, as it has become since the Union, an important commercial country. But with the law of the family relations and the general principles of obligation arising from contract or delict it is otherwise, and the basis of this part of the law of Scotland, although a good deal modified by recent statutes, is still the same as it was at the close of the seventeenth century, and as it is described by Stair.

(To be continued.)

NOTES ON THE LAW OF FIRE INSURANCE.

II. FIRE INSURANCE AS A CONTRACT OF INDEMNITY.

WE have seen from the series of cases ending with *Rayner v. Preston* that the purchaser of a property burned down has at common law no right to a share of the insurance money obtained by the seller, and the circumstance that the seller has already been indemnified by receipt of the insurance money does not entitle the purchaser to refuse payment of the price. But is the seller entitled to have both the price and the insurance money? Certainly not. This follows from the principle that fire insurance is a contract of indemnity. In *Darrell v. Tibbetts* (L. R. 5 Q. B. Div. (C. A.) 560) Lord Justice Cotton said this had been settled in the case of *The North British and Mercantile Insurance Co. v. London and Liverpool and Globe Insurance Co.* (L. R. 5 Ch. Div. 569), a case decided in 1877. In truth it was settled a very long time ago. Mr. Bell, writing in 1821, says (Commentaries on the Law of Scotland, i. 621), "Insurance against fire is a contract by which . . . the insurer undertakes to indemnify the insured against all losses in his house, etc., by means of accidental fire." And in works of authority like Smith's "Leading Cases" (ii. 305, eighth edition), and in judgments like that of Mr. Baron Parke in *Dalby v. The India and London Life Assurance Co.* (15 C. B. 365), the distinction is drawn between life insurance policies on the one hand, and policies on marine risks and policies of insurance against fire on the other, which latter are said to be, what they in terms purport to be, contracts of indemnity.

If the seller obtains the price, or is otherwise indemnified, he cannot sue the insurer. But so long as the purchase money has not been received, the seller is entitled to obtain the insurance money from the insurance office. This was the point, and, although the import of the case has sometimes been misstated, the only point decided in *Collingridge v. Corporation of Royal Exchange Assurance Association* (Nov. 23, 1877, L. R. 3 Q. B. Div. 173, and 37 Law Times Reports, 525). In that case the Metropolitan Board of Works served the plaintiff with a notice to treat in respect of the premises insured. The amount of compensation was fixed by the umpire, the plaintiff's abstract of title was accepted by the Board, and a draft conveyance was being prepared when the premises were injured by fire. The purchase money had not been paid. The plaintiff was held entitled to the insurance money just as if the contract of sale had not been entered into. It was argued on behalf of the insurance company that the plaintiff neither had nor could suffer damage; the purchasers, it was said, being a public body, were *prima facie* solvent, and if the case had gone to a jury, it would have been proved that the purchasers both could and

would pay. The Court, in effect, held they could not go upon that. Mr. Justice Mellor said, "Whether when he [the vendor] receives this money, supposing that the defendants [the insurance company] do not choose to reinstate the premises, he will become trustee of it for the Board of Works [the purchasers] is another question, but I do not see why the unexecuted bargain between him and the Board can affect his right to recover." And then the learned judge proceeded to say, "If it were otherwise he would suffer great inconvenience, and would have to rely on the solvency of the purchaser of his property, and though in the present case the purchaser is a powerful corporation, and there is no reason to doubt that the purchase money will be paid, this is a mere accident which ought not to interfere with his right to take measures for the protection of his security. The defendants are quite mistaken in supposing that they have only to pay the plaintiff the amount of the loss which as between him and third persons he may ultimately sustain." Mr. Justice Lush remarked, "As for the sale to the Board of Works, that may never take place at all; and whether in the event of the sale being completed, the plaintiff may be a trustee for the Metropolitan Board of Works, is a question which has nothing to do with the present case."

In *Collingridge's* case the question was mooted whether the vendor, if he received the insurance money, would hold it as trustee for the purchaser in the event of the conveyance being completed and the purchase money paid. In that case it was not necessary to decide the question. But it is clear that the vendor in such a case is not a trustee for the purchaser, who has (except as in virtue of the provisions of the Metropolitan Buildings Act) no claim against either the vendor or the insurance company, there being as regards the insurance no privity of contract between him and them. This is decided by the above-cited case of *Rayner v. Preston* (L. R. 14 Ch. Div. 297) and the authorities on which it is founded.

Where the insured has a right of redress against a person whose negligence or misconduct has been the cause of the damage, or who is under an obligation to rebuild, he has a double remedy; he may make his claim against either the insurers or the person primarily liable. But if he elects to sue the insurers, and gets the loss made good by them, it follows from the principle that fire insurance is a contract of indemnity, that the insurers are entitled to enforce the remedies of the insured, and indeed are entitled to use the name of the insured in an action against the wrong-doer or other person liable to recover the money which they, the insurers, have paid. The insurers are regarded as sureties who are entitled to all the remedies and securities of the insured, and to stand in his shoes. The leading case on this subject is *Mason v. Sainsbury* (2 Park, 969), where the house of the plaintiff was demolished in the Lord George Gordon riots of 1780; and the insurer, who had

made good the damage, was held entitled in the owner's name to bring an action against the hundred under the Riot Act 9 Geo. I. c. 22. A similar decision was given in *Clark v. Inhabitants of Blything* (2 B. and C. 254), in which case stacks of hay had been maliciously set on fire. A decision to the same effect was given in *Aldridge v. Great Western Railway Co.* (3 M. and G. 515), which was an action against a railway company to recover the value of property set on fire by sparks from the company's locomotives.

Another consequence of the principle that fire insurance is a contract of indemnity is, that if after the insurer has chosen to make his claim against the insurance company, and has received the insurance money, another party is found to be the party primarily liable for the damage, and compensation is made by him, the insurer who has paid the insurance money is entitled to have repetition of it, or so much as remains of it after paying any difference which may exist between the compensation money and the loss. This was decided in the comparatively recent case of *Darrell v. Tibbetts* (1880, *supra*). In that case premises were held under a contract of lease, containing a covenant to repair "except casualties by fire," etc., but the lessee was liable in the case of an explosion of gas. The Corporation of Brighton, in repairing the streets, made use of a steam-roller, the weight of which broke the gas-pipes under the street and caused an escape of gas, and an explosion took place in the demised premises which did serious damage. The premises were insured by the lessor, who received £750 from the insurance company in respect of the damage. An action was brought against the corporation in name of the lessee, the result of which was that the corporation had to pay a sum as compensation for the damage to the lessee, who thereupon, in performance of the stipulation in the covenant, repaired the premises. When the insurance company ascertained that the premises had been repaired they demanded the return of the £750. This demand was refused, and an action for the sum was raised. The Court of Appeal, differing from the learned judge in the Queen's Bench Division, held that the insurance company was entitled to have the insurance money returned. To us the case seems remarkably clear. If the lessor had been entitled to retain the £750 after getting the premises repaired under the covenant by the lessee, he would have been a profitter by the explosion, and the doctrine of fire insurance being a contract of indemnity would have been thrown to the winds. Lord Justice Brett, in the Court of Appeal, gives a very lucid explanation of the case, and also of the law on the subject. He said, "If the tenants had not repaired the damage, and had declined to do so, the insurance company would have been bound to pay the landlord, who had insured with them, but would have had a right to bring in his name an action against the tenants, and recover from these tenants what they have paid to the landlord; in other

words, a policy of fire insurance is a contract of indemnity similar to that which is contained in a policy of marine insurance." The case of the *North British and Mercantile Insurance Co. v. London, Liverpool, and Globe Insurance Co.* "seems to me to show that if the landlord had sued the tenants before he received payment from the insurance company, he must have recovered from them, for it would have been no answer by the tenants that the landlord was insured. That case seems to me also to decide this, that if the landlord had recovered damages from the tenants equivalent to the injury done to him by the refusal of the tenants to repair, he could not afterwards sue the insurance company. The landlord was paid by the insurance company at a time when they could not resist his demand, as they were bound by their contract to pay. Afterwards the Corporation of Brighton, by whose negligence the mischief happened, paid the amount of damage to the defendant's house, and this amount was expended in making good the damage. I think, however, that the case stands in the same position as if the tenants had executed the repairs with their own moneys.

"The question now arises whether the insurance company, who paid the money to the landlord at a time when they were obliged to pay by virtue of their contract, can recover it back because the tenants have done that which they could not avoid doing; if they had not repaired, they must have paid damages to the landlord. If the company cannot recover the money back, it follows that the landlord will have the whole extent of his loss as to the buildings made good by the tenants, and will also have the whole amount of that loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with; the landlord would be not merely indemnified, he would be paid twice over.

"The landlord is liable on another ground also. The doctrine is well established that where something is insured against loss either in a marine or a fire insurance policy, after the insured has been paid by the insurers for the loss, the insurers are put in the place of the insured with regard to every right given to him by the law respecting the subject-matter insured, and which contract is affected by the loss or safety of the subject-matter insured by reason of the peril insured against. So that immediately after the insurance company had paid the landlord, they were put in his place with regard to the contract to rebuild, which was a contract respecting the subject-matter insured, that is, the building, and which contract was affected by the safety or the loss of that building by reason of the explosion, which was a peril insured against; and therefore they are to be subrogated or to be put in the place of the landlord with regard to his rights: they might have sued in his name if the tenants had not repaired, and when the tenants have repaired, the insurance company are to have the benefit of these repairs."

This reasoning applies to the case where, as in *Rayner v. Preston*, the seller obtains the insurance money and afterwards obtains the

purchase money. In such a case the insurance company would be entitled to demand repetition. The seller would therefore be virtually a trustee, not, as has been argued, for the purchaser, but for the insurance company.

A person insured whose property suffers damage may, as we have seen, elect to proceed against either the insurance company or the party who has caused the mischief, or is otherwise primarily and directly liable. The insured has, in short, two strings to his bow, and he may choose either. But if he chooses to proceed in the first instance against, not the insurance company, but the other person liable or alleged to be liable, the insurance company, though they have a very material interest in the success of the action, cannot interfere with the insured in the conduct of the action; he, however, being responsible if he misconducts it, and consequently loses his remedy against the obligant, whom he has selected in the first instance. In the case of *The Commercial Union Assurance Co. v. Lister* (L. R. 9 Ch. App. 483) the owner of a mill had insured it against fire, but not to its full value. The mill was burned through the negligence, it was alleged, of the servants of a municipal corporation. An action was brought by the millowner for compensation for the damage. Eleven insurance companies filed a bill in the suit, praying for a declaration that they were entitled to the benefit of any right of action vested in the millowner, and that he might be restrained from prosecuting his action otherwise than for the whole amount of damage, and might further be restrained from refusing to allow the companies to use his name for the purpose of any proceedings against the corporation. The latter part of the proposal does seem rather audacious. One would think that in the first instance at least, and when matters are entire, a man has a better right to the use of his own name than anybody else has. And certainly it seems a very strange process of law to ask an interdict to restrain a man from *refusing* to allow his name to be used. Suppose the application had been granted, what would have resulted? The millowner would not and could not have refused, but would his non-refusal *per se* have given the insurance companies right to use his name? Would his mere inaction have given them an active right? The plaintiff undertook to sue for the whole amount of the damage, in consequence of which the Court did not require to give any opinion upon that part of the subject. In regard to the other points the Court of Appeal held that the millowner must be allowed to conduct the action without interference by the insurers, but that if in the conduct of the action he did anything inconsistent with his duty, whatever that might be (and what that was, the Court remarked, would have to be determined at the hearing of the cause), he would have to make good any loss thereby incurred.

In the Court below the Master of the Rolls (Sir George Jessel) had said, "The insurance company or companies is or are willing

to pay the amount of the insurance, and they say that having paid that amount (they pay of course by way of indemnity), if the assured obtains from the Corporation of Halifax a sum larger than the difference between the amount of the insurance and the amount of the loss, he is a trustee for that excess for the insurance company or companies, a proposition which I take to be indisputable. But then they want to go further, and they assert that in such a case the insured person though entitled to bring an action for the loss he has sustained, is not entitled to be master of that action; and they assert that though he is acting *bona fide*, he is not entitled to compromise that action or to do anything else without their assent. I can find no ground whatever for such a suggestion."

In the Court of Appeal Lord Justice James said, in reference to the latter of these questions, the right of the insurance companies to interfere in the conduct of the action, "At present the plaintiff in the action against the corporation is himself *dominus litis*, subject to a liability to answer in this Court for anything which, upon the hearing of the cause, should be shown to be a breach of some equitable obligation, or a violation of some equitable duty which has been cast upon him by reason of the circumstances of the case."

On the other point, the question whether the insured, if he obtained from the corporation a sum larger than the difference between the amount of the insurance and the amount of the loss, would be a trustee for that excess to the insurance companies, Lord Justice James expressed himself with more caution than the Master of the Rolls. He refrained from deciding the matter until it came before him for decision. "If I were to put the defendant under any restriction about compromising or anything of that kind, it would be determining the whole case and deciding that he is a trustee for the insurance companies. That, however, is a matter not to be determined on this interlocutory application, and I cannot now say that he is a trustee in such a way that he is to be deprived of his own free action with respect to a matter in which he is personally and largely interested. Then the Master of the Rolls in the course of his judgment threw out an observation, that if the defendant compromises he must compromise *bona fide*; but what that is the Master of the Rolls has not determined, and I do not determine."

We have seen that when a house or other building is conveyed during the currency of a policy of insurance, and the building is burned down, all benefit under the policy is lost unless the policy has been specially assigned. The purchaser cannot claim the insurance money either from the insurance company or from the vendor when the vendor has managed to obtain the insurance money, because he is no party to the policy. The vendor cannot claim the insurance money, because if he obtains the purchase money he suffers no loss for which he requires to be indemnified.

The consequence is that it is the insurance company who profits. The same kind of thing happens in a case where the tenant is under a covenant to repair, as in *Darrell v. Tibbetta*. In that case the tenant no doubt had recourse against the corporation, which was in fault. But the damage might have been merely accidental, and the tenant would have no wrong-doer to fall back upon. It does seem inequitable that the insurance company which has pocketed the premiums paid on account of a certain risk should escape scot-free when the loss has occurred in contemplation of which they have been paid. It does seem inequitable that the company should reap advantage from the inadvertency of not attending to the formality of obtaining an assignation to the policy, an act or omission in which the company take no part. No doubt a partial remedy is provided by the Act 14 Geo. III. c. 7, sec. 83. But if this provision is a right one, why should not its operation be extended? Why should the remedy be so limited and so accidental and precarious in its application? It is only after a distinct request to the insurance company by the person interested in or entitled to the buildings before the insurance money has been paid over to the policyholder, that the person so interested in the property can avail himself of the remedy provided by the statute. But the purchaser or other person interested may not happen to be aware that the property has been insured. Or he may not happen to know that this statutory remedy exists at all. If he does know of its existence, most certainly his knowledge has not been obtained from any Scottish legal treatise. Or suppose he does become aware that there is an insurance over the property, or that there is such a provision in the statute, his knowledge may come too late to be of any value to him. We think the law should be altered so as in all cases, whether there is a special assignation or not, to make the policy inure to the purchaser, care of course being taken to provide some safeguard which will secure the seller's right to the purchase money. Such an alteration would of course make the insurance companies liable in a few cases in which they are not liable at present. But why not? Receiving the premiums, it is only fair that they should be liable for the risk.

DIRLETON'S DOUBTS.

DIRLETON'S DOUBTS may be said to rank as one of the minor classics of Scottish legal literature. The work never seems to have reached a second edition, nor is it to be found in any other form than that of the folio of 1698, the full title of which is as follows: "Some Doubts and Questions in the Law, especially of Scotland, as also some Decisions of the Lords of Council and Session: collected

and observed by Sir John Nisbet of Dirleton, Advocate to King Charles II. To which is added an Index for finding the principal matters in the said Decisions. Edinburgh: Printed by George Mosman, and are to be sold at his shop in the Parliament Cless, Anno Dom. M.DC.XCVIII." Probably the work had at the time a good sale. It may be had even at the present day for a very modest sum; a copy in good preservation, with the fine portrait of the author, will cost the purchaser 3s.

The work is a posthumous one, possibly never intended for publication by its author. It saw the light under the editorship, we believe, of Sir William Hamilton of Whitelaw, who in a brief preface says, "His [Dirleton's] long practice and profound knowledge in our laws gave the rise to the following doubts and questions, which if he had lived he would have answered and cleared, as he has done many of them, to the great satisfaction of our ablest lawyers, and great improvement of our law." Of the Decisions which are printed and form one volume with the Doubts the editor says, "The Decisions are what his leisure from public office could allow him to observe, and were ever thought so succinct and judicious that most lawyers were at pains to cause copy them from the common manuscripts, though neither full nor correct, which now in the printing is carefully helped." The "sole privilege of printing and selling" this work, granted to George Mosman, stationer, burgess of Edinburgh, for the space of nineteen years, is dated at Edinburgh 15th July 1697, and extracted by Gilbert Elliot, the founder of the Minto family, and then clerk to the Privy Council. Both Hamilton and Elliot were men of note in their day. The former was called to the Bar in 1664, and is said to have been the first candidate who underwent a public examination in civil law. He was one of King William's judges, taking his seat as Lord Whitelaw in 1693. From October 1704 until his death in December of that year he held the office of Lord Justice-Clerk. If we are to attach any weight to Jacobite authorities, the character of this judge was far from good, and according to the Scottish Pasquils, when he was called from the Court of Session it was to take his place upon that bench which we associate with the name of Rhadamanthus. Gilbert Elliot was a noted Whig, originally a writer in Edinburgh, and before he could be called to the Bar had to obtain a remission of a sentence of high treason pronounced against him as accessory to the rebellion of 1679. The revolution brought prosperity to Elliot, who was knighted, made clerk to the Privy Council, and finally was appointed a Lord of Session and of Justiciary. In his earlier days, while a writer, he had acted as agent for a persecuted minister of the name of Veitch, and seems to have obtained no small fame in this capacity. Both lived to enjoy their rewards, and the judge was wont to say to his quondam client, when he visited him in the snug living of Dumfries, "Ah, Willie, Willie, had it no been for me the pyets had

been pyking yere pate on the Nether Bow Port;" when the minister would reply, "Ah, Gibbie, Gibbie, had it no been for me ye would ha'e been yet writing papers for a plack the page."

But we must refer now to our author himself. This St. Thomas of Scottish lawyers was the son of Patrick Nisbet of Eastbank, apparently the founder of the family, who was admitted a Lord of Session in 1636. His mother was one of the Craigs of Riccarton. Called to the Bar three years before his father was promoted to the Bench, he was made Sheriff of Edinburgh in 1639, and in 1664 was appointed to the somewhat incongruous offices of Lord of Session and Lord Advocate. As he was public prosecutor until 1677, it may be easily imagined that he has not wanted detractors. In the pages of Kirkton and Wodrow he figures unfavourably. The former says, "About this time Sir John Nisbet was made Advocate in place of Fletcher, a man of far more dangerous temper; for money might sometimes have hired Fletcher to spare blood, but Nisbet was always so sore afraid of losing his own great estate, he could never in his own opinion be officious enough to serve his cruel masters." Wodrow relates a story which, if true, is sufficient to render his memory for ever hateful. We shall give it in Mr. Wodrow's own words. It was in the case of a Mr. Robert Gray, examined before a committee of Council. His answers not being satisfactory, "the advocate [Dirleton] urged him to swear upon his declaration. This he flatly refused as contrary to all reason and law that a person should swear in such a case as this. When the King's Advocate finds him positive, he steps forward to him; and after some pretended frankness and familiarity in further dealing with him, he takes his ring from off his hand, telling him he had use for it; and within a little sends it with a messenger of his own to Mrs. Gray, ordering the bearer to acquaint her that her husband had discovered all he knew as to the Whigs, and the ring was sent her as a token that she might do the same, and so she is brought before the committee. Upon this the poor woman discovers more than her husband had done. When Mr. Gray got notice how his wife had been abused with his ring, and what followed thereupon, he took it most heavily, sickened, and in a few days dies, leaving his death upon this way of treating him."

But it is to be hoped that posterity will not form an impression of the characters of Mr. Gladstone or Mr. Forster from the diary of Mr. Parnell, or even the forthcoming volumes of Mr. Justin McCarthy's history. It cannot, however, be denied that the Lord Advocate of that day must of necessity have been involved in many shady, not to say discreditable, transactions. He was too active and important a member of the wretched Scottish government to keep himself wholly undefiled. It is ever to be regretted that men of such ability and good qualities as Sir George Mackenzie and Sir John Nisbet should, from worldly and selfish motives, have allowed themselves to become the tools of oppressors.

As a scholar and lawyer Nisbet was certainly an ornament of the profession in which he held so prominent a place. Mackenzie thus describes him as a pleader, "Opposuit ei (Gilmorio) providentia Nisbetum; qui summa doctrina consummataque eloquentia causas agebat, ut justitiæ scalæ in æquilibrio essent; nimia tamen arte semper utens artem suam suspectam reddebat. Quoties ergo conflixerunt, penes Gilmorium gloria, penes Nisbetum palma fuit; quoniam in hoc plus artis et cultus in illo plus naturæ et virium."

Bishop Burnet tells us that he was a great Greek scholar, and there is an anecdote preserved which indicates at once his love of that language and his great wealth. It is said by Forbes that "at the burning of his house Lord Dirleton lost a curious Greek manuscript written with his own hand, for recovery whereof he offered £1000 sterling to any person that would restore it."

In the course of his public career he seems to have made enemies more powerful than the unfortunate Covenanters, and was obliged to resign his offices in 1677. Ten years later he died at the age of seventy-eight. Burnet has described him as "a person of great integrity, only he loved money too much, but he always stood firm to the law."

The fact that the "Doubts" were published under the editorship of a Whig lawyer, and at a time when the name of Sir John Dirleton must have been far from popular, is in itself perhaps a proof of the value then attached to the work itself. The name "Doubts," although applicable to much which the book contains, hardly conveys a fair impression of the whole contents. While in some cases a doubt is suggested and no solution attempted, in others an answer, which evidently settles the matter in the writer's mind, is given; and a third class consist merely of statements of the law, frequently from foreign sources.

The great majority of the points raised are of merely antiquarian interest. Some call to mind historical facts then recent. Thus under *Oath of Coronation* the question is stated, "If what is required and promised by the king at the time of his coronation be understood to be *conditiones regni*, so that the same not being fulfilled, the people is free?" It was certainly necessary that the King's Advocate should have an answer to such a question, seeing that Charles II. had at his coronation accepted the Covenant presented to him, and had certainly failed to govern in accordance with its principles. The answer is just what we might expect from the Crown Office officer of that day. "These are not *conditiones* either *suspensivæ* or *resolutivæ*, but *modus regnandi*: and albeit *modus* ought to be fulfilled, and subjects who are under a coercive power may be urged to observe the same, yet a prince who is subject to no higher power *relinquitur religioni juramenti* and *Deum solum habet ultorem*." In other words, where a king and his people make a bargain, the people are bound, the king is free. The illustrations which he gives in support of his opinion will hardly

convince the reader in these days. There is the case of a father bound not to provoke or wrong his children, and "yet if he do otherways the relation is not taken away;" and of a husband or wife who is still bound by the marriage, although there may be a failure to comply with the stipulation of mutual duty implied in the married state. Under the head of *Confession by Criminals* he puts this question, "If a confession be emitted and signed before the judge in the Criminal Court, may the panel retract and not adhere to it before the Assize, so that the inquest cannot proceed on it as an evidence and clear probation?" This question, or something like it, had been raised in a famous criminal trial of the day, that of Mitchell for shooting at the Bishop of Orkney. Mitchell, under a promise of his life, given, if we mistake not, by the Chancellor, confessed his guilt to the Privy Council, but afterwards, when remitted to the bar of the Justiciary Court, he tendered a plea of not guilty. Archbishop Sharp's connection with this case is well known; it probably had the result of hastening that prelate's tragic doom.

There are points raised which remind us of the state of Scotland at that time. Thus under *Lawburrows for Burghs* there is the question, "If a burgh be lyable to find lawburrows for their burghesses?" Under *Militia*, "The gentlemen that went out in a troupe in the late expedition having been at charges for a banner, trumpet, and coat, etc., *quæritur*, if the said charges may be laid upon the whole shire?" This latter question is answered in the negative. The following were doubtless suggested by the residence of Scotchmen abroad for political reasons: "A native living abroad, and being Popish, and going to the Mass where he liveth, *quæritur*, whether he forefaulteth his estate in Scotland? *Item*, If he intercommune there with persons forefaulted in Scotland, whether he be lyable, as having contravened the law of Scotland; so that if he have any estate in Scotland it may be affected? If a prince may command a subject living abroad under his enemy to retire and come home? And if he disobey, may he be proceeded against and be divested of any fortune and liberty competent to him as a native?" Other questions illustrate the restrictions then imposed upon the admission of evidence. It is asked, "Whether qualified oaths may be received before inferior judges? *Answer*, It is thought not. The question, whether the qualities should be construed qualities or exceptions, being of that difficulty that they are not to be decided by inferior judges." Again, "*Quæritur*, If women witnesses may be admitted in the case of divorce to prove adultery? *Answer*, This question is under debate upon advocacy from the Commissars of Edinburgh having admitted the same." Then follow the arguments *pro* and *con*, one of the latter being "that by our law women are not habile witnesses." This subject of the incapacity of women to give evidence is a curious one, and the reader will find some interesting remarks upon it in More's "Notes on Stair," cccix. Mr.

More mentions the case of *Wiseman*, 13th Jan. 1736, as the latest reported decision in which a female witness was rejected, observing, "It is a remarkable fact that, in the eighteenth century, such a judgment should have been pronounced by any court of justice in Europe."

The following question under *Seasin*, which gave a good deal of trouble at one time, had been settled by statute before these "Doubts" were published: "A posterior *seasin*, but first registrar, whether will it be preferred to the prior *seasin*, registrar thereafter though *debito tempore*?" (See 1693, c. 13 and 14.)

Lord Fraser in his "Husband and Wife" has described Dirleton as a Scotch consistorial judge of great authority, and in the famous case of *Kerr v. Martin* he is quoted by both sides upon the Bench.

The very name of Dirleton's work will suggest itself to persons of a satirical disposition as descriptive of the science to which his talents were devoted. It was Lord Chancellor Hardwicke, if we mistake not, who pronounced his "Doubts" as better than most people's certainties. And yet every man is held responsible for his ignorance of the law.

The form of this work has never been imitated. But many doubtful points remain. Our debating societies find no difficulty in framing their case-books. One learned judge who still adorns our Bench could suggest numerous questions, for great is the number of dissents which he has tendered against the decisions of recent years.

RECENT CASES AS TO JURISDICTION IN QUESTIONS OF MARRIAGE AND DIVORCE.

A LEARNED writer, whose style was more remarkable for the originality of its combinations than for its elegance or its accuracy, in an article which appeared some time ago (not in this Journal), observed that "lawyers cannot always be soaring in *apicibus*." But lawyers who have no ambition for such Icarian cruises, and whose adventurous song does not intend to soar above the Aonian mount, or to pursue things, so far as diction is concerned, unattempted yet in prose or rhyme, but are content with a middle flight, are yet often compelled to deal with matters which are *inter apices juris*. There are no questions which have a better title to rank in this order than questions as to jurisdiction in cases of marriage and divorce. How far a Court has power to give a decree dissolving a marriage contracted in another country between subjects of that country, and how far the Courts of the country where the marriage was contracted are bound to recognise such a decree, are questions not of mere technical and professional interest, but, their solution leading

to grave conflicts between the laws of different countries and even the different divisions of the same country, necessarily suggest considerations of great social and national importance.

We have had in our Scottish Courts within not many months two cases as to jurisdiction in actions for divorce which must become leading cases on the subject. The first of these is *Carswell v. Carswell*, in the Second Division of the Court of Session (July 6, 1881, 8 Rettie, 901). In that case the spouses were native Canadians. The marriage was celebrated in Canada. Canada was intended to be the matrimonial domicile, and was so for some years until the wife deserted the husband. The husband came to Scotland avowedly to establish a domicile in order to get a divorce on the ground of desertion, which he could not have got in his own country, the law of Canada not allowing a divorce on that ground at least. He settled in Scotland, entered into business there, and after residing and carrying on business for a couple of years or so raised his action. When examined he stated that he had the intention of remaining in Scotland, and to make Scotland the place of his domicile. No notice was personally served upon the wife, for the simple reason that the pursuer did not know where she was. The Second Division, reversing the judgment of the Lord Ordinary (Lee), held that the *animus remanendi* had been made out, that a sufficient domicile had been acquired, that the domicile of the husband was the domicile of the wife, and accordingly they gave decree dissolving the marriage.

The decision in *Carswell's* case we do not exactly say is open to question, but it suggests grave doubts as to the expediency of the present state of our law.

In the first place, we confess to a strong repugnance to the Courts of any country being made a convenience of by parties who resort to them simply and solely in order to obtain a severance of the marriage tie which they could not have got in their own country where the marriage was celebrated, and where the matrimonial relation was intended to exist.

Further, it is hardly possible to banish from the mind the idea that a hardship is done to the wife. We confess to some sympathy with the view expressed by Lord Westbury in *Pitt v. Pitt* (4 M'Queen, 627) when he said he would have great difficulty in holding that "the domicile of the husband is to be regarded in law as the domicile of the wife either by construction or attraction, so as to compel the wife to become subject for the purposes of divorce to the jurisdiction of the tribunals of any country in which the husband may choose to acquire a domicile"—a difficulty, however, which, it is fair to add, Lord Kingsdown stated in the same case he did not share. The wife may fairly say, why should she be subject to a law under which she did not contract, the law of a country where she never has been, so as to deprive her of her status and her pecuniary rights for causes which would have no such effect by

the law of the country of the spouses' origin, where the marriage was celebrated, and where it was understood and intended that the parties should live as man and wife? Is not this, the wife may say, the law which ought to regulate all the incidents of the marriage relation? Of course we know it has been laid down that it is not the law of the place of contract but the law of the domicile which must regulate the incidents of the marriage. But there are domiciles and domiciles. There are real and actual domiciles, constructive domiciles, and what we may call got-up and *ex post facto* domiciles. Three different cases may be supposed, to which it is not necessary to apply the same rule. A man and a woman are domiciled in one country; they leave and become domiciled in another. There is no injustice in the law of the new, the voluntarily chosen and actual domicile ruling there. Or the husband may abandon his original domicile, acquire a new one, leaving his wife behind, and she commits a fault which according to the law of his new domicile, which is constructively hers, entitles him to a divorce, although it would not according to the law of the country in which alone they ever lived as a married pair. This is the case to which Lord Westbury apparently alludes, and as to which he expresses a doubt, or more than a doubt, whether the wife's domicile should be regarded as that of the husband. But then there is the third case, where, after the fault has been committed in the country where the spouses were married and had their domicile, the husband acquires a domicile in another country for the express purpose of obtaining a divorce. There is surely a hardship in subjecting the wife in this case to the law of the new domicile. It is here that the shoe pinches.

In this case of *Carswell* it is fair to say that Lord Moncreiff disclaimed the idea that in every case the wife's domicile was that of the husband, and that idea has been disclaimed in previous cases. Still, in this case, as a matter of fact, it was held that the wife's domicile was that of the husband, even when the husband expressly acquired a new domicile in order to get quit of his wife when he could not get quit of her by the law of their original and their real domicile. It is to be observed that the wife had no notice of the action. Lord Moncreiff observed, "So far as I can see, the wife could make no good answer to the charge of wilful, malicious, and obstinate desertion." The answer to which is that in general, so far as one can see from the statement of the one side, there is nothing to be said against it; but when the statement of the other side is submitted, one often finds there is a good deal to be said against it. Lord Young remarked that "every Canadian, and indeed every rational and intelligent human being, is, according to the views of the law of Scotland, at liberty to change his domicile. He may leave the country where he was born, where his domicile and his home have been since his birth, and he may adopt another country and make it his home." No doubt; but it does

not follow from this that he is entitled to drag his wife constructively after him in order to get rid of her when he discovers her in a fault.

As regards the question of domicile, there must always be a difficulty in such a case as that of *Carnoll* in determining whether there was the *animus remanendi*, the intention to make the new home the permanent home, which, according to the view taken at least by Lord Westbury in *Pitt's* case, is necessary, since it is necessary to establish that complete domicile which alone can found jurisdiction in a case of divorce. In a case of succession one has all the elements before him to judge by. But where a husband, for example, the pursuer in an action for divorce, states that he has the *animus remanendi*, we have so far to take his word for it. After he has got what he wants he may "sleeve his head through the halter," and return to his own country. In such a case would a decree of reduction be allowed?

At an earlier stage of our law a residence or domicile of a much slighter kind would have sufficed to ground jurisdiction. Such a decision as that in *Lolly's* case, where jurisdiction to dissolve an English marriage was held to be founded by a forensic domicile—mere residence for forty days—would not be repeated now. There may be a medium, however, between a mere forensic domicile and such a complete domicile as is necessary for purposes of succession. In the present state of the authorities it is impossible to say whether anything short of a domicile of succession would suffice. The case of *Pitt v. Pitt* in the House of Lords is sometimes regarded as deciding that nothing less would suffice. But the House of Lords had not the opportunity of determining the point, the respondent's counsel having abandoned the view taken by the majority of the Court of Session that a less domicile than the domicile of succession would suffice. No doubt Lord Chancellor Westbury approved of the concession made by counsel, "a concession which is, I trust, in the opinion of your Lordships, quite in accordance with the law of the case." This, however, is not a decision. And in the case of *Wilson v. Wilson* (March 8, 1872, 10 Macph. 577) Lord President Inglis stated, "I have always been of opinion, as I expressed myself in the case of *Pitt*, and I have never seen any reason to change that opinion, that for the purposes of divorce there may be a matrimonial domicile differing from the absolute domicile which will rule succession." In the very recent case of *Stavert v. Stavert*, presently to be adverted to, the same learned judge observed that "a very important question arose in some such cases, whether the domicile which was necessary to found jurisdiction in such an action was the same domicile which would regulate the intestate succession of the husband, or whether it would not be sufficient that Scotland was the settled home of the parties for some considerable period, where the spouses had elected to live together without any immediate intention of leaving—where,

in short, their 'household gods are set up,' and where, if they happened to be separated by voluntary or judicial separation, would be the place that the one party owed to the other the obligation of returning, in order to the restitution of conjugal rights. It had not been decided in the Court of last resort whether this kind of domicile was sufficient. If it depended upon the decision of this Court, it was pretty clear what the result would be." Lord Deas and Lord Shand expressed opinions similar to those indicated by Lord Westbury.

There are many cases readily conceivable where there would be great inconvenience caused and practically great injustice done if no remedy could be found except in the Courts of the country where the husband had such a domicile as is required in a case as to succession. Take this case suggested by Sir James Hannen in *Farnie v. Farnie* (L. R. 5 Prob. Div. 153). A man goes abroad, gets married, engages in business, but has not the intention of remaining in his new country until the end of his days. On the contrary, he intends to return to the land of his nativity as soon as he has acquired a sufficient fortune. In fact, so far from having an *animus remanendi*, he has a very strong and inspiring *animus revertendi*. In order to obtain redress against a guilty wife, must he resort to the Courts of the country which is still his domicile in the amplest sense of the term, when all his property, his interest, his means of subsistence, and the evidence in support of his allegation are in the country where he is, and has for the best years of his life been, resident? To require him so to do would, as likely as not, be tantamount to depriving him of redress altogether.

One awkward incident of such a decision as this of *Carswell* is that it will not be recognised in Canada. This is a consequence not, directly at least, of the difference between the marriage laws of the different portions of the British Empire (which cannot well cease from existing so long as there are differences in race, and differences of history, and therefore differences of creed and character), but from the different principles as to jurisdiction recognised by the Courts of these countries which have different marriage laws. The Canadian law, which on the subject of marriage and divorce appears to be the same as the English law, barring the Act of 1857, does not any more than the English law recognise desertion as a ground of dissolving a marriage, at least a Canadian marriage. The principle of the English law (and the Canadian law is the same) is that the English Courts will not recognise a dissolution of a marriage contracted in England by persons at the time of the marriage domiciled in England, for causes for which it could not be dissolved in England. This is the principle of the English decision in *Lolly's* case, as explained by the later authorities, which will be found collected and enforced in the judgment of Sir James Hannen in *Farnie's* case. The import of *Lolly's* case has been often misunderstood. It has been supposed

that the doctrine which the English judges laid down was that the English Courts would not recognise any decree of dissolution of an English marriage granted by a foreign Court. What was really laid down was that the English Courts would not recognise a dissolution of an English marriage granted by a foreign Court for causes for which it would not be granted in England. Of course, as the English law stood at the time of *Lolly's* case, the principle when applied led to the result that a foreign decree dissolving an English marriage was of no effect; but this was the temporary result of the principle, not the principle itself. The case of *Farnie* has sometimes been regarded as overruling the case of *Lolly*. It was nothing of the kind. So far as the opinions expressed in *Farnie's* case bore upon *Lolly's* case, they explained it; but the decision did not overrule it. The distinction drawn in *Farnie's* case was that the marriage though contracted in England was not an English marriage, being contracted by a domiciled Scotsman with a domiciled Englishwoman, whose domicile immediately became that of her husband. As regards what recognition would be given by the English Courts to a decree of dissolution of marriage in such a case as that of *Carswell*, supposing the marriage to be an English instead of a Canadian one, the English judges in the most recent cases give no uncertain sound. Sir James Hannen in *Farnie's* case said (L. R. 5 P. and D. 157), "*Assuming that we protect the interests of society in England against the dissolution of the marriage of English persons abroad for some cause for which it could not be dissolved here*, there seems no reason why, by the comity of nations, we should not recognise the decree of a foreign Court which proceeded upon principles in accordance with the English law, where the parties have not gone abroad for the purpose of defrauding the English law, but, being abroad, have sought only such a remedy as they might have obtained in England, why should we not recognise the sentence of the foreign Court?" And Lord Justice James in the Court of Appeal in the same case said (L. R. 6 P. and D. 46), "A wife's home is her husband's home; a wife's country is her husband's country; a wife's domicile is her husband's domicile; and any question arising with reference to the status of those persons is, according to my view, to be determined by the law of the domicile of those persons, assuming always that the domicile is a *bona fide* one, not a domicile either fictitious or resorted to for the sole purpose of altering the status. I am not, however, prepared to say that an English husband could by going to a foreign country for the sole purpose of domiciling himself in a place where a marriage could be dissolved at pleasure, be enabled to obtain a valid and binding dissolution of his own marriage. That point it is not necessary for us to decide."

Can it be said that the English judges, in holding that they will not recognise the dissolution of an English marriage by a Scottish Court for reasons for which it would not be granted in England,

are without show of reason? They desire to be influenced by the principle which is expressed by the phrase *comitas gentium*. They desire to preserve their own laws. When an Englishman or a Canadian resorts to another country for the express and avowed purpose of obtaining a divorce which he could not obtain by the laws of his own country, is it not natural that the Courts of his own country should say, "The law of your own country does not allow you to get a dissolution of marriage for the reason you state? The Legislature may alter the law, but the Legislature has not as yet chosen to alter the law. You cannot be permitted to do at your own hand what the Legislature has not chosen to do, and you will not be permitted to do so by a trick."

It would be too much to expect that the Courts of different nations should arrange to respect each other's decisions. There is no international authority to give effect to such a purpose. But surely it is not impossible that some uniform rule as to jurisdiction on a matter so deeply affecting the relations of society as marriage and divorce should be established in the different parts of her Majesty's dominions. The consequence of the divergent, or rather the antagonistic, views of the English and the Scottish Courts on this subject is just this, that a man may be held in England to be married and in Scotland to be unmarried. And suppose, after getting a divorce in Scotland, he marries again, and has issue, his children are legitimate in Coldstream and bastards in Berwick. Nobody can say that this is a seemly state of matters or one which is conducive to the wellbeing of society.

The other case to which reference has been made is that of *Stavert v. Stavert*, decided by the First Division of the Court of Session on the 4th of February last. The case is peculiar, and if one were in a sardonic mood one would be tempted to say that it looked like an organized attempt to make a burlesque of the whole law upon the subject. The defender was an Englishman born and bred. He had no real connection with Scotland. He had left his wife and lived with another woman. He was unable to get himself divorced in his own country, having only been guilty of adultery. By a singular, and singularly unjust, anomaly of the English law, a wife can be divorced for that offence, but a husband requires to combine cruelty or desertion for two years. So the defender came to Scotland in order to qualify himself for being divorced from the first lady. The pursuer came to Scotland also. After the action was raised the defender read an article in a London newspaper which gave him the impression (not an ill-founded one) that a decree of divorce granted by the Scottish Courts in the circumstances of the case would not be recognised by the English Courts, and that consequently any second marriage would by the Courts of his own country be held invalid. The defender, therefore, pleaded "no jurisdiction." He stated that he had not any *animus remanendi*. The Court gave effect to his plea. We can

scarcely wonder at the decision. When a man is held to have a domicile in Scotland (to which he repairs avowedly for the purpose of obtaining a divorce) sufficient to found jurisdiction, because he has started a business in Scotland, and states that he has the *animus remanendi*, one would say that the Court has gone as far as it could with safety and propriety. But surely it would be too much to hold that a man has a domicile in Scotland (to which he repairs avowedly for the purpose of obtaining a divorce) sufficient to found jurisdiction, when he does not start a business or otherwise settle in Scotland, when he states that he has not the *animus remanendi*, that any intention to remain that he ever had was to remain until he got a decree dissolving his marriage, and that he had abandoned that intention when he found that such a decree was not to suit his purpose in all respects.

From Illinois there has been sent to us a report of the judgment pronounced by the Hon. John Jameson, in the Supreme Court of Cook County, in that state, in the case of *Madelaine Roth v. Frederick Ehman et al.*, a case regarding the validity of a marriage and the authority to be given to the decree of a foreign Court annulling the marriage. The judgment is long and elaborate, and the views of the learned judge are supported by some hundred and twenty references to authorities, decisions, and legal treatises. We confess to having a predisposition to doubt the soundness of a decision or an argument which requires to be so elaborately fortified, and a perusal of the present judgment has not tended to diminish this predisposition. The essential circumstances of the case, so far as regards the question of jurisdiction, or rather the question by what law the validity of the marriage was to be determined, are as follows. A man, Roth, a subject of the King of Wurtemberg, emigrated to Chicago, where, during a business life of about a quarter of a century, he acquired a large property, both heritable and moveable. Towards the end of this period he married in Chicago Madelaine Moser, the complainant in the action, a native of Alsace. Some years afterwards Roth and his wife left America, and took up their abode in Schorndorf in Wurtemberg. In 1870, some years after their settling down there, Roth raised an action of nullity of marriage against the wife, who on the institution of the proceedings went to reside in Alsace, and in 1873 the decree was granted. The ground of action and decree was that Roth had not complied with a law of Wurtemberg which declared void all marriages of subjects of that kingdom contracted abroad without the licence of the king. Shortly after, Roth, of course, married another woman, Amalie Staehle, one of the defendants in the Illinois action. On his death, without issue of either marriage, the first wife raised this action under consideration, urging that the Wurtemberg decree of nullity of marriage was of no effect as regarded the property in Illinois at least, and claiming as relict her share in the succession to that property, real and personal. As regards the domicile of

Roth and his first wife, the learned judge states, "As the result of all the evidence, that at the time of their marriage in Illinois they were domiciled there; that when they returned to Wurtemberg they changed this their domicile of choice to Wurtemberg, that of Roth's origin; that at the time of the institution of the nullity suit in Schorndorf in that kingdom Roth still had his domicile there, whilst that of his wife had been again changed to the domicile of her origin, Alsace, and that their respective domiciles thereafter remained the same until the death of Roth." "Few causes," he further says, "I imagine, have ever arisen involving more of the complicated and interesting problems of private international law than this. By what law shall the validity of the two marriages of the intestate Roth be determined? By what, that of the decree of nullity of his marriage with the complainant? If that decree was valid by the law of Wurtemberg, how is it to be regarded by the Courts of Illinois?"

The learned judge decided that the decree of nullity of the first marriage being the decision of a competent Wurtemberg Court, must be recognised everywhere else, and in Illinois in particular; that the second marriage must, consequently, be recognised as the valid marriage, and therefore that the complainant Madelaine, the first wife, was not entitled to any share of the succession of the deceased, even of the real estate situated in Illinois, where the marriage was celebrated. The method of reasoning by which this result is arrived at is singular. The question as to the validity or invalidity of the Illinois marriage depends, says the learned judge, "upon the place by whose law such marriage is to be tested, whether Wurtemberg or Illinois. . . . There are three theories as to the place which ought to furnish the law by which marriage is to be governed:" first, that it is the *lex loci contractus*; second, that it is the *lex domicilii*; third, that it is the law of the domicile of origin, "which under the name of 'their personal statute' is supposed to accompany the parties wherever they go." But "a distinction has been established which removes from the category of disputed cases all such as involve questions merely as to the formal requisites as distinguished from the essentials of marriage. It is generally conceded that the former are to be determined by the *lex loci contractus*. What is to be referred to form and what to essentials may be thus discriminated: When parties are not prohibited absolutely from marrying, but from marrying without certain preliminaries, as the consent of parents, such prohibitions are to be referred to the form." Now if there ever was a case in this world which unmistakably fell within this category, and in which therefore the law to be applied was the *lex loci contractus* (which happens to be the law of Illinois), it is the present case. If the consent of parents is a preliminary which is to be referred to the "form," surely the consent of the King of Wurtemberg is so too.

Further, the learned judge remarks (p. 11) that of the three theories stated, he must reject "that of the 'personal statute' as opposed to our national traditions and policy." There being only two remaining theories, that of the *lex loci contractus* and that of the *lex domicilii*, and the law of Illinois being both, one would have thought that there could be no difficulty in applying the law of Illinois, according to which the first marriage was good, nay, that there was an insuperable difficulty against not applying it.

But it is further said (p. 12) that "whether the law of the domicile, the *lex loci*, or the 'personal statute' be applied in any particular case, we should recognise the fact that the rule of decision must really be the *lex fori*. That is, the law for the case in hand must ever be that of the country whose tribunal is to pass upon the question." Surely, then, in a case before an Illinois Court the law to be applied is the law of Illinois. One would have thought that the question was conclusively settled. According to the learned judge's own statement, there are only three laws which can possibly be applied after the personal-statute theory is rejected—the *lex loci contractus*, the *lex domicilii*, and the *lex fori*. The law of Illinois is all the three, and the first marriage is good by the law of Illinois.

Then it is said in this remarkable judgment, the next question relates to the validity of the second marriage, "or since no objection can be raised to it in point of form, to the validity of the decree of nullity of the previous marriage, upon which depended the capacity of Roth to contract such second marriage." One would have thought that the first marriage being valid according to the law of Illinois, which is the *lex loci contractus*, the *lex domicilii*, and the *lex fori*, by one or other of which the question, it is stated, has to be decided, there could be no question in an Illinois Court about the effect to be given to the decree of nullity of marriage, or as to the validity of the second marriage, bigamy being, according to the laws of every Christian nation, not an institution but a crime. But the judgment goes on to say, "To decide that the Illinois marriage is valid is not equivalent to deciding that the Wurtemberg marriage is void. The Illinois marriage might be valid here, if drawn in question directly in our Courts, and on the principle just stated be invalid in Wurtemberg, when tested by its Courts applying the law of that kingdom, declaring it, if contracted without the royal assent, void. And the Illinois marriage tried by Illinois law, and in an Illinois Court, might be valid, and the decree of nullity in the Wurtemberg Court be valid and effectual also to annul it, because the Illinois marriage was invalid by Wurtemberg law and in the Wurtemberg Courts." Surely no such nonsense was ever talked out of Bedlam. For an Illinois Court to decide that the Illinois marriage is valid is equivalent to deciding that, so far as concerns the Illinois Court and the matters over which it has jurisdiction, which of course includes the right of succession to the heritable property situated

in Illinois, which is to be determined by the *lex rei sitæ*, the second, the Wurtemberg marriage, is invalid. For an Illinois Court to decide otherwise is to decide that according to the law of Illinois the first marriage is both valid and invalid.

It is not difficult to see how the learned judge diverged into error. He proceeds to say, "It is a general rule that all the principles applicable by private international law to divorces are applicable equally to decrees of nullity." There is one exception, he says, in suits for nullity of marriage, it is not to be presumed as in suits for divorce that the domicile of the wife is that of the husband. "The decree of nullity of the Wurtemberg Court will, therefore, be considered on the authority, save as to the point of complainer's domicile, as if it had been one for divorce *a vinculo*." Here is the origin of the fallacy. Here we find "the little rift within the lute." A decree of nullity of marriage cannot be considered as a decree of divorce in regard to the question whether the decree of a foreign Court is to be recognised, simply because it is not a decree of divorce but differs from it *toto cælo*. A decree of divorce dissolves the marriage, a decree of nullity of marriage declares that the marriage never existed. The Courts of a country in which a marriage is celebrated, and according to the law of which the marriage is good, may, as our Scottish Courts do, recognise a decree of divorce dissolving that marriage granted by a foreign Court. In doing so the Court does not hold that a marriage good by its own law has become bad by the decision of a foreign Court; they still uphold the validity of the marriage. But the Court of a country in which the marriage is celebrated, and according to the law of which the marriage is valid, cannot recognise and act upon the judgment of a foreign Court declaring that the marriage is invalid without stultifying itself. In this case effect can only be given to the Wurtemberg decree by preferring the Wurtemberg law to the Illinois law, which is just falling back upon the theory of the "personal statute," a theory which the learned judge has expressly stated he discards.

The gist of the decision is just this, that the law of Illinois is the law which is to decide as to the validity of the first marriage, and by the law of Illinois the first marriage is valid: the law of Wurtemberg is not the law which is to decide as to the validity of the first, and by the law of Wurtemberg the first marriage is invalid; therefore the law of Illinois, the law which is applicable, is not to be applied, and the law of Wurtemberg, the law which is not applicable, is to be applied.

Many decisions and authorities, as we have already intimated, are cited in this elaborate judgment. There is, however, one case not cited which is exactly in point, viz. *Simonin v. Mallac* (29 L. J. Rep. (P. and D.) 97, 3 Swabey and Tristram, 67). By the Code Civil of France a marriage contracted abroad between a Frenchman and a Frenchwoman, or between a French subject and a foreigner, is not valid except it is celebrated after the publication and with the

consent of the parents, if the man is under twenty-five and the woman is under twenty-one. The parties in this case of *Simonin* were French subjects, and the woman was under twenty-one. They went to London for the express purpose of getting rid of this personal incapacity, and got married without making the publication or obtaining the consents required by the French law. The French Courts held the marriage not valid, the English Courts held that it was. The English Courts could not recognise any artificial and local restriction imposed by the law of France, and held, in fact, that the validity of the marriage, when the only objection was with reference to the form, was to be determined by the law of the place of celebration. This is a much stronger case than the Illinois one, because in the latter the parties did not repair to Illinois to evade the law of their own country, but, on the contrary, they were at the time of the marriage domiciled in Illinois.

Similar opinions to those acted upon by Sir Cresswell Cresswell in *Simonin's* case have been expressed in Scotland. In *Gordon v. Pye* (Fergusson's Consistorial Reports, p. 361) Lord Meadowbank puts the question, "Would a marriage here be declared void because the parties were domiciled in England, and minors when they married here, and of course incapable by the law of their country of contracting marriage?" plainly intimating his own opinion that it would not.

The English case of *Medlock v. Medlock*, decided by Sir James Hannen and a jury in July last, is an illustration of the facility with which divorces can be obtained in some of the United States of America, of the culpable laxity, amounting to a connivance at fraud, in the mode of procedure adopted in such cases in some of the remoter states, and of the case with which all the difficulties arising from the conflict of jurisdictions, the difficulties arising from the desire to act in accordance with the *comitas gentium* clashing with the desire to maintain the principles of the jurisprudence of one's own country, are swept away when the Courts of this country find that the jurisdiction, real or supposed, has been exercised in a manner that cannot fairly be called judicial.

The circumstances of the case were these: The husband and the wife were domiciled in England, and were married there. Shortly after the marriage he went to America on what he stated to be a business excursion. While on this excursion he became enamoured of a married lady resident in Chicago. She obtained a divorce from her husband in an Illinois Court. Medlock proceeded to Colorado, where people get rid of their spouses much easier than they get rid of their beetles, raised in one of the County Courts there an action of divorce against his wife on the ground of desertion, of which no notice ever reached the wife, obtained decree of divorce, and then married the lady who had obtained a divorce in Chicago. All this was very convenient so long as it lasted, but the original Mrs. Medlock becoming aware of

these proceedings, raised an action of divorce in this country on the ground of her husband's bigamy, and the case being practically undefended, obtained decree. Sir James Hannen said he was saved the necessity of deciding whether the decree of divorce granted by the County Court of the State of Colorado was or was not valid. It seems to us that in giving decree in favour of the wife in this action he did decide this question, and decide it to the effect that the Colorado divorce was invalid. If the divorce obtained by the husband was valid, no divorce could be granted at the suit of the wife. The marriage could not be dissolved at her request in that case, for there was no marriage to be dissolved. A similar decision was given two years ago in the case of *Briggs v. Briggs* (L. R. 5 P. and D. 163), where a domiciled Englishman married in England to a domiciled Englishwoman went to Kansas, and after the interval of a year, but without becoming domiciled there, presented a petition and obtained a decree of divorce on the ground of desertion, and married again. On the wife raising an action of divorce in the English Court on the ground of her husband's bigamy, the Kansas decree was disregarded and the wife's petition was granted.

What the requisites as to citation are in the State of Colorado, and there must be some, we are not informed. At any rate the practice in regard to this matter must be loose, for the wife in this case of *Medlock* received no notice. Probably the practice there is like that of Kansas, where, in *Briggs'* case, the Court was satisfied with the oath of the husband that he had posted to his wife in England notice of his petition, and by publication of the notice in a Kansas newspaper during three weeks.

No attention could be paid to a decree of dissolution of marriage so obtained in such a Court. That a woman born in England, resident in England, married in England to a domiciled Englishman, should be liable to lose her status and her patrimonial rights as a married woman by the decree of a backwoods lawyer in a State where she had never been, and of whose precise locality probably she had but a dim idea, in a suit of which she had received no notice at the instance of a husband who was not a native of, or a resident, or intended to become a resident, in that foreign State, but who had gone thither simply for the purpose of obtaining the divorce, obtaining it for a cause for which he could not have obtained it in his own country, and obtaining it surreptitiously—this would be repugnant to every principle of reason and justice. If such a decree were recognised by the Courts of the country where the marriage was celebrated, the next thing we should hear of would be the recognition of divorces granted by the Courts of Timbuctoo, or the Lord High Chancellor and Keeper of the Conscience of the King of the Cannibal Islands.

In looking into the divorce laws of the United States, one is struck by the enormous variation between the laws of the various States as to the causes for which divorce may be granted, and the

methods of procedure, base or rigid, in obtaining the remedy. In some States it would seem that the influence of the Catholic doctrine still remains. In these divorce is allowed with obvious reluctance. In New York adultery is the only ground. In Georgia, Mississippi, and Alabama the assent is necessary of two-thirds of each branch of the Legislature following on a judicial inquiry. In South Carolina and Virginia there must be a special Act of the Legislature, as in England before the Act of 1857. In the former of these States there has been no divorce of any kind since the separation of the States from the mother country. Contrast this with Indiana and Missouri, where, besides the ordinary ground, divorce is allowed on account of abandonment by either of the spouses for two years, condemnation for a felony, barbarous and inhuman treatment by the husband, or his habitual drunkenness for two years. This is extensive enough, but what follows is still better. Also, "in any other case where the Court in their discretion shall consider it reasonable and proper that a divorce should be granted;" which reminds one of Dean Aldrich's concluding reason for drinking—"Or any other reason why."

Correspondence.

(To the Editor of the "*Journal of Jurisprudence*.")

ATTORNEY CERTIFICATES.

SIR,—The exaction of the licence at the increased rate from agents who, though admitted for three years, have not been in practice, is undoubtedly unjust, but it is the invariable rule followed by the Inland Revenue, and seems to be borne out by the wording of the Act.

This grievance, however, is totally swallowed up in the greater injustice of imposing a licence at all. As it at present stands this is an outrageously invidious tax, which is not justifiable on any equitable grounds whatever, and it bears very hardly on all young practitioners.

"H. G." refers to the fact that members of the Bar and doctors are not charged any annual licence. He might have added that no other professional men (properly so called) are subject to the imposition, such as clergymen, accountants, architects, civil engineers, stockbrokers, bankers, etc. The injustice and invidiousness of the tax is therefore most manifest. And it is well known that accountants do legal work, many of them having a law department, with a staff of law clerks headed by a law agent, unlicensed however, and sometimes unadmitted.

The tax is not yet quite a hundred years old, having been

instituted in 1785 when there was a deficit of £413,000 in the revenue, and only as a sort of *dernier ressort*, after several other proposals which were too unpopular to be adopted had been made. Probably the solicitors had not then sufficient influence in Parliament and were forced to submit to be victimized.

The question of abolition has already been before Parliament. In May 1865 a motion with this object by Mr. Denman (now Justice Denman?) was carried by a majority of 3, but was finally rejected in 1867 by a majority of 21 in a house of 153, chiefly owing to the strenuous opposition of the Government. The Chancellor of the Exchequer had only two arguments for retaining the tax, viz. that it had been paid for a great many years, and that it was not right to relieve solicitors without relieving all other taxed callings, and in support of this latter argument he brought in the licences paid by auctioneers, pawnbrokers, and hawkers. This I consider was nothing short of an insult to the profession, and, besides, the licences charged against these trades rest on quite a different footing.

Then look at the large amount of stamp duty which a solicitor has to pay to Government on admission, from which every other profession, and even trade, is exempt. Doctors have to pay £10 *only* when they take a University degree of M.D., which of course a large number never do. Nobody else has to pay anything.¹ It seems to me incontestably clear that if there is any profession or trade which should be *the last* to be taxed annually, it is that of a solicitor, and that on grounds both equitable and ethical.

I don't see why the various influential legal bodies cannot combine and resume the agitation for the repeal of this unjustifiable impost. They would be sure to succeed. Even the Chancellor of the Exchequer did not maintain that it should be permanent, but at the time the Government could not afford to lose the money. Let them relieve all or tax all, but "*fiat justitia, ruat cælum.*"

Most of the particulars I have given, together with details, will be found in vols. ix. and xi. of the Journal.

I quite agree with "H. G." as to notaries. Most of them practise under false pretences, calling themselves solicitors when they are not, and they are admitted on shockingly easy terms besides. Therefore, till they are abolished altogether, which I hope will be soon, they should be made to pay for their privileges.—I am, sir, your most obedient servant,

LAW AGENT.

JURISDICTION OF ENGLISH COURTS.

SIR,—I have read with much interest the report by the directors of the Scottish Trade Protection Society anent the jurisdiction

¹ Not quite correct. Advocates at the Scottish Bar pay £50 stamp duty on admission, Fellows of the Royal College of Physicians £25.—ED. J. of J.

assumed by the English Courts over domiciled Scotchmen, as appearing in the February number of your Journal.

In connection with this subject I may mention that I recently applied to the Lord Chancellor for appointment as a Commissioner to administer oaths in Scotland for the Supreme Court of Judicature, as I was of opinion, from the number of such cases which had come under my observation, that an additional appointment would be convenient for the inhabitants of Dundee and neighbourhood. After the papers in connection with my application had been left at the Law Institution, and with the Lord Chancellor's secretary, the latter informed my London agent that the Lord Chancellor would not make any more appointments of Commissioners in Scotland, as he considered that under 15 and 16 Vict. c. 86, sec. 22, it was unnecessary to do so. I accordingly referred to that Act, and it is quite clear that the terms of sec. 22 when read along with sec. 82 of "The Supreme Court of Judicature Act, 1873," enable, *inter alios*, any notary public to act as a commissioner to administer oaths in Scotland for either Division of the Supreme Court of Judicature. In proof of this I have administered oaths on more occasions than one since I referred to these Acts, and my attestations have not been objected to.

I farther found on referring to "The Supreme Court of Judicature Act (Ireland), 1877," that sec. 74 thereof contains a similar provision with reference to oaths in the Irish Supreme Court, so that in Scotland any notary public may also act as a commissioner for Ireland without any special appointment.

I have drawn the attention of several of my professional brethren to the terms of the above enactments; but as the matter is one which is of interest to the profession generally as well as to the public at large, I now bring it under your notice in the hope that you will find space for this letter in the next issue of the Journal.—I am, sir, your obedient servant,

THOS. LITTLEJOHN,
Solicitor and Notary Public.

Reviews.

Select Titles from the Digest of Justinian. Edited by T. E. HOLLAND and C. L. SHADWELL. Oxford: Clarendon Press. 1881.

It is difficult to see what good end this compilation can be expected to serve. The reason given for its publication in the preface is that since few students can attempt to master the whole Digest, it is desirable to make a selection of the more important titles. This has been done under the familiar heads, Introductory or General Matter, the Law of Family, of Property, and of Obligations, each

head embracing about half-a-dozen titles. The value of the book can scarcely lie in the preface, for the information there conveyed is only of the tritest and most elementary kind. Nor can it lie in the arguments prefixed to each title, for they convey no sufficient clue to the vagaries of the jurists. Nor do the conjectural emendations on Mommsen's text seem to justify the publication, for of the thirty-four suggestions three-fourths would be obvious to a fifth-form boy, and most of the rest may be found in a book no more recondite than Godefroi's big volume. The book is not self-contained. It even proceeds on a possession by the student of the Institute, Digest, and Code *in extenso*, since it makes a selection of references, more or less apt, to parts of Justinian's law-books which are not contained within the boards of this collection. We hope we are wrong, but the fact seems to be that the students of Roman Law in England are expected to be satisfied with the crumbs which fall from the tables of the German civilians. It is nothing to them or their advisers that a "square meal" may be had at very little more cost than this scanty fare. Besides the fat little old copies of the Corpus which are to be picked up for a trifle at every book-stall, there are many modern editions to be had at little cost. When will our Oxford and Cambridge friends give up expecting to find within any one book or any one title of the Pandects a systematic treatise on its subject, or anything approaching to one? It will then be time for them to look round for some English imitation of the German "Pandektenlehre." At present Mr. Hunter's book is the only treatise of the sort. But even a commentary on the Institutes would be better training for the student than the present work.

The Institutes of Justinian, edited as a Recension of the Institutes of Gaius. By THOMAS ERSKINE HOLLAND, D.C.L. Second edition. Oxford: Clarendon Press. 1881.

This is an exquisitely printed and altogether a most dainty edition of the Institutes of Justinian; the plan on which it has been edited cannot be better explained than by the following extract from the preface: "Such portions of Gaius as were left standing when his Institutes were revised by Tribonian are printed in a darker type. The section of Gaius where each passage occurs is indicated by a marginal reference; and in order to maintain the continuity of these references sections of which no use was made are also indicated in the margin, but are enclosed in brackets. Where passages have been borrowed from other writings of Gaius, their commencement is indicated by a marginal reference to the author and his work; their termination, unless otherwise obvious, by a marginal line. When the borrowed passage occurs in more works than one, more than one reference is given. Lastly, the numerous

constitutions referred to in the text have been as far as possible identified with laws preserved in the Code and elsewhere."

From the above it will be seen how convenient and useful this edition of the Institutes will prove to the students of Roman Law. The famous text-book has certainly never before been produced in such an elegant form, and the *Index Rerum et Locutionum* is ample and accurate, greatly facilitating the work of reference to the contents of the book.

Obituary.

JOHN FORMAN, Esq., W.S. (1862), died on 18th February, aged forty-four.

The Month.

Notes on Summary Jurisdiction (Scotland) Acts, 1864 and 1881.—"The Justices of the Peace for the County of Edinburgh in Quarter Sessions assembled" have recently memorialized the Secretary of State for the Home Department complaining of these Acts. They state that offences under the Road, Weights and Measures Acts, and other statutes have been in use to be prosecuted summarily in their county, and the penalty usually imposed ranging from 1s. to 5s.—the usual average being 3s. 6d., which included 1s. of costs. The memorialists do not state the form of procedure which was adopted with these results, or whether they were brought under the Small Debt Act. But they mention that by the Act of 1881, where the party pleads guilty, the *minimum* costs are £1, 0s. 6d., and which is greatly increased where the accused pleads not guilty. The number of offences tried before the Justices of Edinburgh last year is stated as about 480. The memorialists state that "it is manifest that the *expenses* of the new procedure are out of all proportion to the *finer* imposed for road offences, and will not be recoverable in most instances from carters and other persons of the class usually charged with them, even were it just to award such expenses in connection with such petty offences." The memorialists add that "it may be contended that the Justices in convicting an accused person have power to modify or remit the expenses; but if that is done, the expense of the prosecution will require to be borne by the county, which is necessarily an injustice to the general community." The memorialists respectfully suggest "that an Act should be at once passed, making the adoption of the Act 1881 in Justice of Peace Courts *optional*; but declaring that, whether the Act be adopted or not, the fees in all prosecutions in Justice of Peace Courts shall not exceed those prescribed by the Act, or in some other way removing the *onus* to which the memorialists have referred." The difficulties

which have been felt by the Justices in Edinburgh have less or more been felt in every Court in Scotland. The great disproportion between the fine or penalty and the costs is justly a grievance, and the theme of much complaint. Where the Legislature has fixed a *maximum* of penalties averaging of 10s. to 40s. it looks absurd to inflict a sum of £3 or £5 for its recovery. The magistrate is thus compelled, where he is not prevented by statute, to make the penalty merely illusory, and mitigate it to a few shillings, that he may be enabled for the sake of appearance to impose £3 or £5 of costs. The greatest number of minor offences are those under the Road Act, the enforcement of which are of great importance for the general police of highways. Now that there is the removal of toll-gates, perhaps this requires greater superintendence and vigilance on the part of the police.

Under the General Road Act for Scotland (1 and 2 William IV. c. 43, p. 109) the penalties might be prosecuted and recovered by—first, the Procurator-Fiscal; second, by the Justices represented by their clerk (under sec. 16), or any person authorized by them; or, third, by any one of their number. The mode of procedure was regulated by the 110th and 111th sections, and it was left to the magistrate, “duly considering the nature of the case, if he shall think fit, and not otherwise, to proceed in a summary way,” “*without written pleadings or record of evidence.*” Most of the penalties for road offences were recoverable by poinding of moveables, and failing recovery, the accused was subject to imprisonment for certain defined periods. The Act contained no table of fees for prosecutions. It does not appear that costs were recoverable from the accused, but the 109th section made it “lawful for the Trust to allow the expenses of prosecutions to be defrayed out of the funds of the Trust.” Under this Act road offences were frequently prosecuted in the summary form usual in inferior Courts, and expenses were awarded at the rates applicable to civil or criminal cases, but more frequently they were conducted in a more summary manner under the 111th section of the Act. The various forms adopted will be found in the appendix to Sheriff Barclay’s “Highways,” 1867 (fourth edition). By the Act 1 Vict. c. 41 (1837), extending the first Small Debt Act, 10 George IV. c. 55, “it was made *competent* to try and determine in a summary way” all “civil causes and all prosecutions for *statutory penalties* wherein the debts demanded or *penalty* does not exceed £8, 6s. 8d. exclusive of expenses and fees of extract.” No. 8 of the schedule contains “*summons of complaint for statutory penalty*, with relative decree for prosecution of *penalty.*” The Act contains a table of fees for the clerks, the officers, and the criers, and the 36th section enacts “that in all cases where the debt demanded or *penalty* does not exceed £8, 6s. 8d., and not according to the summary form herein provided, it shall be lawful to allow no *other* or *higher* fees or expenses to be taken or paid than those above-mentioned.” Generally throughout Scotland statutory penalties were hitherto recovered under the Small Debt Act, 1837, and that with great ease and satisfaction. In Perthshire and other counties the Chief Constable was authorized by the several district trustees to prosecute. The police took cognizance of the road offences, and periodical Courts were held at which fines varying from 5s. to 20s. were awarded chiefly to meet expenses, and it was added to the sentence in terms of the 111th section

of the Act that the fines were to be so applied. This practice was continued *after* the passing of the Summary Procedure Act, 1864, and until the Roads and Bridges Act was adopted (41 and 42 Vict. c. 51, 1878). The 3rd section of the Act enacts "that the provisions of this Act *may* be applied to all proceedings in virtue of the summary jurisdiction conferred in relation to the trial of offences and recovery of penalties." Throughout the statute the words are simply *permissive*. It is notorious that *after* the passing of the Act prosecutions were brought in the old *formula*, and under the Small Debt Act. When complaints were brought under the Summary Procedure Act, 1864, there being no table of fees, the grievance was first felt that the fees were charged according to the ordinary table of fees applicable to criminal cases, and 30s. or 40s. were charged for the initiatory complaint, though stereotyped save in the name of the offender, and place and time of the offence. Often a fine of 5s. was imposed, and there was added an award of £3 or £4 of costs. It was chiefly from this grievance that the amended statute 44 and 45 Vict. c. 37, 1881, was passed. The statutory terms denote this latter Act, as the former, to be merely *permissive*. Section 3rd expressly *permits* the forms in local Acts, or the forms in the Summary Jurisdiction Acts, to be used. The chief object of the Act 1881 is disclosed in section 4th, which regulates the scale of expenses, and declares that no "*other or higher fees*" shall be allowed than is enacted by the scale, and it does not *repeal* the Small Debt Act (?).

There is a clause in the Act 1864 which certainly does raise a serious difficulty. The 27th section of the Act has the marginal note, "*Jurisdiction of inferior Courts not to be extended.*" Marginals are doubtless not to be read as part of a statute, but it testifies to the meaning the draftsman put upon his own work. It shows that it was meant that the existing jurisdiction was "*not to be extended,*" but it never could be meant that it should be *limited or extinguished*. The section should be preserved amongst the "*curiosities of legislation.*" It runs in these words: "Nothing in this Act contained shall confer, or be construed to confer, upon any Sheriff, Justices, or Justice, or Magistrate acting under the authority of this Act, any *other or more extensive* jurisdiction in relation to any matter which may be made the subject of complaint than is or shall be vested in such Sheriff, Justices, or Justice, or Magistrate at Common Law, *or under any Act of Parliament* empowering them, or any of them, to take cognizance of such matter of complaint; nor shall anything in this Act contained affect any right to sue by way of ordinary action, in the Court of Session or Sheriff Court in Scotland, for the recovery of any penalty or forfeiture, *save and except as to the right of suing for such penalty or forfeiture in the Sheriff Small Debt Court in the form provided in the fourth-recited Act.*" The last sentence is wholly unintelligible. It would appear to have been subsequently added to the original clause, and to denote that the jurisdiction exercised in the Small Debt Court was "*saved and excepted*" (but from what it is not said). It never could be meant as destructive of existing statutory jurisdictions. Sheriff the Honourable Henry J. Moncreiff, in his excellent treatise on "*Review in Criminal Cases,*" ventures an opinion that from the 27th clause of the Act 1864 "*it appears that*

the provisions of this Act for the recovery of statutory penalties are *intended to supersede* those of the Small Debt Act, 1837." It will not derogate from the author's acknowledged ability to doubt this inference. He only says "that it *appears* that the clause was *intended to supersede*." He does not venture to say that it has *repealed* the previous statute. It is notorious that since the passing of the Act 1864 prosecutions without number have been brought in Small Debt Courts without any challenge. There is no better known rule of interpretation in statute law than that by no mere *implication* or *inference* can a right or jurisdiction be given, but only by express and unequivocal terms; much less can a right or jurisdiction once conferred be abolished except by clear and definite repeal. The power who made the law can alone recall it, and it cannot do so in language that can only be *construed* as that it *intended to supersede* its former work, but it must declare so in as express terms as it did when it originated and announced the law. Lord Justice Turner laid it down as law "that a *special* statute could not be repealed by a *general* statute without words of *special* application." 18th January 1855 (Hawkins). So it was held "that *special* powers in an Act are not repealed by *general* terms in a subsequent Act" (*London and Blackwall Railway Company v. Kay & Johns*). Baron Platt observed, "Acts of Parliament must be construed by a candid mind, and with an intention to understand them" (*Crake v. Powel*, 2 L. Q. B. 188).

On the whole, it appears that all statutory offences where the penalty does not exceed £12 may still competently, cheaply, rapidly, and efficiently be tried under the Small Debt Act, and to hold that that statute has been repealed or *superseded* would be a grievous mistake and misfortune to the country. It would be to hold that one *permissive* Act by mere *inference* repealed a former and existing statute somewhat more than permissive.

NESTOR.

"TRUX APER INSEQUITUR."

(Appeal—*M^r Vey v. Hennigan*, January 12, 1882.)

Tune—"Judy Callaghan."

THERE lived, as I am tould,
 In Stirling's noble city
 Two Irish lads so bould,
 The subjec' av me ditty;
 They both had pigs galore,
 And sties to fence and screen 'em,
 And each possessed a boar
 With only a hedge between 'em.
 Says M^r Vey,
 "Darlint Mr. Hennigan,
 You must pay
 If your boar comes in again!"

Tony Hennigan's boar,
 Faix! he loved to wandher;
 Divvle a wall or door
 Would kape him from his dandher.
 And mostly he would hie
 To Pat M'Vey's back garden,
 And grunt about the sty
 Where Pathrick's pigs were barred in.
 Says M'Vey, etc.

At last one day, when Pat
 Was atin' av his dinner,
 His wife cried out, "There's that
 Ould boar, as I'm a sinner!
 O Pat, rise up, make haste!"—
 And Pat obeyed her ordhers,
 And swore he'd drive the baste
 From out his garden bordhers.
 Says M'Vey,
 "Darlint Mr. Hennigan,
 You must pay
 Now your boar's come in again!"

But Tony's boar! worse luck!
 He had a heart so darin',
 Bedad! he ran amuck
 At this bould son av Erin;
 So Pat was forced to fly,
 And moighty quick he went, too,
 While Piggy from his thigh
 Tore out a small memento.
 Says M'Vey, etc.

Then Pathrick to the Coort
 He dhragged the porker's mather,
 And swore that such a hurt
 Bank notes alone could plaster.
 The sty was insecure,
 The boar was most fherocious,
 And Tony's conduct, shure,
 Was blackgyard and athrocious.
 Says M'Vey, etc.

"Me piggy has," says Tone,
 "The swatest, best av naytures,
 And, Pat, ye should have known
 The ways av them dumb craytures;
 His timper's easily stirred
 When takin' av his airin',

Nor can he stand a worrd
 Av cursin' or av swearin'."
 Says M'Vey, etc.

Upon the case there sat
 Two Sheriffs, larned brothers,
 One gave his vote for Pat,
 And Tony got the other's;
 And so when months had passed
 In strife and opposition,
 The case was brought at last
 Before the Coort av Sission.
 Says M'Vey, etc.

The Lorrds, in gownds so grand,
 Were tould the dismal story
 How Piggy, though so bland,
 Made Pathrick's groin so gory!
 They said 'twas not polite
 For Pat to use such langwidge,
 Still, Piggy had no right
 To eat a raw ham sandwich!
 Says M'Vey, etc.

Then nivver, if you're wise,
 Permit your pigs, be jabers!
 To thresspass on the thighs
 Av your Milesian neighbours;
 For boars whose moral sinse
 Is shocked by imprecation
 Are apt to take offince
 At all the Irish nation.
 Says M'Vey, etc.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

MACBEAN v. THE CLYDESDALE BANKING CO. AND OTHERS.

Furthcoming—Common debtor's funds lodged in bank under false name.—The pursuer, Mrs. Agnes Livingston or MacBean, obtained decree in absence against her husband, William MacBean, for aliment for eight months for herself and children. On trying to arrest on the decree she found her husband had £226 lodged in bank under the name of William Cameron. MacBean was now in America, and in the action of furthcoming which she raised he was cited edictally. He did not appear, nor did "William Cameron" though

called. *Held*, on proof, that the money in the hands of the arrestees was in reality MacBean's money; that the arrestees were justified in appearing as defenders; that the pursuer was entitled to obtain decree of furthcoming; and that MacBean's funds were in the circumstances liable for the costs of the arrestees.

"Glasgow, 2nd December 1881.—The Sheriff-Substitute having considered the cause, In respect of no notice of appearance having been entered for the common debtor, William MacBean, otherwise William Cameron, holds the same William MacBean, otherwise William Cameron, as confessed: Finds on the proof adduced that between 1876 and 1881 William MacBean, the pursuer's husband, had on deposit receipt granted to him under the name of William Cameron by the arrestees, the Clydesdale Banking Company, a sum of money of fluctuating amount, which on 11th August last amounted to £228, and for which sum they granted a receipt to the said William MacBean under the name of William Cameron: Finds that the receipt granted on that day under the name of William Cameron contains the money which belongs to him, the said William MacBean, the pursuer's husband: Finds in these circumstances, as matters of law, that the said sum of £228 and interest thereon held by the defenders the Clydesdale Banking Company in name of William Cameron is liable to diligence and to be made forthcoming for the debts of William MacBean, defender, and that the Clydesdale Banking Company are in safety, and are bound to make it so forthcoming to the pursuer under her arrestment and this decree: Finds in the circumstances of the case that the Clydesdale Banking Company were entitled for their own protection to defend the cause, and that the expense to which they have been put having been caused by the fault of the common debtor, they are entitled to retain the amount of their expenses out of the fund held by them for him under the name of William Cameron: Finds the said William MacBean, otherwise William Cameron, common debtor, liable also to the pursuer in her expenses, and before pronouncing further allows accounts of said expenses to be given in; and remits the same, when lodged, to the Auditor to tax and to report.

"J. M. LEES.

"Note.—The evidence leaves no room for doubt that the 'William Cameron' in question was just a name assumed by the pursuer's husband. It is proved that during the last five years there was no such person as William Cameron resident at any of the addresses given to the bank in any of the transactions as to the money held by them in deposit receipt for the person giving his name as William Cameron. It is proved that William MacBean, the pursuer's husband, resided from time to time in succession at the four addresses given during these years and in the same order. The photograph of MacBean is identified as the person who dealt with the bank under the name of Cameron. The handwriting of MacBean is recognised as the handwriting of the person calling himself Cameron; and a deposit receipt granted by the bank to the person giving the name of William Cameron was seen in MacBean's chest. The reason for MacBean's lodging the money under another name is supplied by the fact that he was on bad terms with his wife and strove to keep her from finding out where his money was, while his selection of Cameron as his pseudonym is accounted for by that being his mother's name, just as his adoption of Benson at one time as his name is explained by its being the equivalent in English of MacBean.

"There are other facts which aid in showing that MacBean and Cameron are the same person, but it is unnecessary to enumerate them. And I need hardly say it would never do to hold that a man could protect his funds from the diligence of his creditors by lodging them in bank under a false name. The banking company are of course entitled to be kept safe; but the judicial warrant now granted to them after investigation will alike entitle and require them to deal with the fund in question as liable to be made forthcoming under the arrestment the pursuer has used or any she may subsequently use. And

in the circumstances of the case and of the pursuer, who is suing in *formd pauperis*, I do not regard it as necessary to order security to be found; but it will be proper that she should grant her personal obligation. J. M. L."

The defenders appealed to the Sheriff, but eventually abandoned their appeal; and on the taxation of the accounts of expenses the following interlocutor was pronounced:—

"*Glasgow, 20th January 1882.*—The Sheriff-Substitute having resumed consideration of the cause, with the reports by the Auditor on the accounts of expenses of the pursuer and the defenders the Clydesdale Banking Company, taxing these at the sums of £21, 16s. 5d., and £8, 13s. respectively, Approves of said reports; and in application of the previous findings in the case, grants warrant to and ordains the said Clydesdale Banking Company to pay to the pursuer out of the funds held by them in name of William Cameron, called as a defender to this case, but which are in reality the property of William MacBean, defender and common debtor, first, the sum of £11, 17s. 9d., being the sum decerned for against the said William MacBean in the extract decree No. 7/1 of process, and covered by the arrestment No. 7/2 of process; second, the sum of £21, 16s. 5d., being the taxed amount of the pursuer's expenses as aforesaid, and included in the said arrestment No. 7/2 of process: Further grants warrant to and authorizes the said Clydesdale Banking Company, arrestees and defenders, to pay to themselves, in terms of the prayer of the petition, out of the said common debtor's funds, the sum of £8, 13s., being the taxed amount of their expenses as aforesaid; and to the extent of £42, 7s. 2d., being the *cumulo* amount of the three sums above mentioned, holds the deposit receipt granted by the said arrestees, the Clydesdale Banking Company, to the said William MacBean, common debtor, under the name of William Cameron as cancelled, and to said extent, and relative interest authorizes the said Clydesdale Banking Company to withhold payment thereof, and decerns.

"J. M. LEES."

SHERIFF COURT OF PERTSHIRE.

Sheriff BARCLAY.

M'LAUGHLAN v. FRASER.

This was an action of damages for reparation of an injury inflicted by a bite of a dog in the defender's custody. The pursuer was delivering some goods purchased from his father. The dog, which was going loose, bit the pursuer. The defender admitted liability, and tendered £20 for the injury, which was rejected, and an action instituted claiming £150 of damages.

"*Perth, 29th December 1881.*—Having heard parties' procurators, and made *avizandum* with the process, proofs, and debate, Finds as matters of fact—(1) The pursuer, on 1st June last, received from a dog in custody of the defender a severe bite on the right hand, whereby he was under medical treatment for about four weeks; (2) the defender, admitting liability, before the institution of the action offered £20 to the pursuer as a solatium or damages for the injuries so received, with the addition of paying the medical account, and which offer was judicially repeated in process and not accepted; (3) the pursuer sued for £150 of damages, and has made no restriction of his claim in course of the process; (4) under the whole circumstances disclosed in the proof, finds the claim sued for and maintained unreasonable, and the tender made by the defender fair and reasonable: Therefore decerns for £20 (the defender relieving the pursuer of the surgeon's account): But in respect of the tender, finds the pursuer liable in the expenses of process from the time of the *judicial* tender: Remits the same, when lodged, to the Auditor of Court to tax and to report, and decerns.

HUGH BARCLAY.

"*Note.*—There is an axiom alike in equity as in law, that no person can profit by the loss or at the expense of another. There the measure of damage

is just according to the rule of profit and loss. There are other cases where damage has been suffered from some *malicious* or *reckless* act. In that case the persons occasioning the damage are amenable to the criminal law on account of *culpa*. The person injured has also his *civil* claim for damage, and the measure of which is ascertained according to the usual rules of evidence in all civil cases. It is impossible for any one, the most sanguine or incredulous, to believe that the pursuer in this case has suffered loss or damage to the extent of £150. This amount he sued for and maintained to the last, and wished Dr. Bramwell to give his opinion whether that sum was not '*extravagant compensation*'? When £20 was first tendered no counter-offer of a larger sum was offered to be taken. When the Sheriff-Substitute read the record, he was then of opinion that the offer, with relief of the medical expenses, was fair and reasonable. But he waited to discover what the proof should disclose. The proof now shows the offer to be reasonable. The pursuer is not in trade or business for himself. He has no wages, and suffered no loss on that account. There is evidence that his father, who is under obligation to support his son, suffered some little inconvenience or loss, but the pursuer cannot claim on that account. The pursuer is not a *handicraftsman*, and so the injury to his *hand* is not in any way detrimental to his success in future life, as it would have been to an artisan. The pursuer has no one depending on him, but he himself is so far a dependent on his father. The fear of supervening hydrophobia is a fallacy which the medical gentlemen effectually disabused. No doubt there are cases on record that this mysterious malady has resulted at great intervals after the bite. But in these cases the animals were shown to have been under *rabies*. It never is expected that such distemper exists in well-fed and cared-for household dogs. The Sheriff would rather have apprehended from the lacerated hand an immediate attack of *tetanus* or lockjaw, but the dread of that is fortunately now long past. Neither party is entitled to costs before the judicial offer, but the defender is entitled to them subsequent to the *judicial* tender. The recent case quoted by the pursuer's solicitor (1st July 1881, *Burton v. Muirhead*) is not adverse to the amount of damages now given, but is rather favourable. There £150 was asked, as here, and only £50 was awarded. In that case the pursuer was a '*dancing-master*,' and was bit on '*the left leg near the ankle*.' He appears to have been *married*, and the reasonable presumption is that he would have children. He was confined to the house for *eight weeks*, and suffered '*a severe shock to his system*' and '*permanent injury*.' The art or profession which the pursuer in that case followed must have been an all-important element in fixing the amount of damages. Some people depend for their sustenance on their *heads*, '*the sweat of the brow, or of the brain*,' others depend on their *hands*, but a dancing-master entirely depends on his feet. His legs, a pair of pumps, and a cremona form his entire capital stock-in-trade. A bite '*on the ankle*,' and *eight weeks* confined to the house, and '*permanent injury*' was certainly a cutting off of the supplies. '*Othello's occupation's gone*.' If £50 was only given in such a case, certainly £20, with relief of medical expenses (no mention of which is made in pursuer's case), is relatively more than adequate where the injury was sustained by one on whom no one depended, and which only confined him to the house *four weeks*, and did not prevent his pursuing his former career. The Sheriff knew nothing of the mental state of the pursuer before the injury, but his appearance in the witness-box gave the impression that he was of that dull phlegmatic mind that little could either elevate or depress him. The injury here resulted from a mere accident. It was a misfortune. The person who suffered from the misfortune is entitled to be adequately recompensed for loss sustained, but it is against all equity to realize a *fortune* out of a *misfortune*. The attempt to accomplish this is every day seen in actions of damages for accidents by railways and otherwise, where the claim is, as here, laid extravagantly; but a very diminutive sum is afterwards accepted or awarded by a judge or jury, who, it may be said, never homologate the claim as first laid.

H. B."

Act.—M'Cosh.—Alt.—Whyte.

SHERIFF COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

TAYLOR v. TAYLOR.

Right of way—Lease—Tenant.—Circumstances in which held that one tenant was not entitled to exclude another upon the same estate from the use of a cart-road leading from the farm of the latter through that of the former.

The facts in this case are sufficiently stated in the following interlocutor of the Sheriff-Substitute :—

Banff, 25th January 1882.—The Sheriff-Substitute having heard parties' procurators on the concluded proof and made avizandum with whole process, Allows the pleas tendered at the conclusion of the proof to be received and added to the pleadings : Finds, in point of fact, that the pursuer is tenant of the farm of Milton under a lease granted in 1857, and renewed in 1869, said lease expiring in 1905 ; that by said lease the farm of Milton was let to the pursuer, 'as now possessed by him ;' that from time immemorial there existed a narrow road or footpath leading from the highroad through part of the farm of Milton to the defender's farm of Tombain, which marches with that of Milton, both farms being upon the same estate and belonging to the same proprietor ; that about thirty-eight years ago the pursuer widened and improved said road, rendering it fit for traffic by means of carts and other vehicles, and that for at least thirty-three years said road has been freely used as a cart-road both by the defender and the pursuer, the former availing himself of it as the principal access to his farm of Tombain, and assisting to maintain it in good condition : Finds, consequently, that for a number of years prior to the date of the pursuer's present lease, when he obtained the farm 'as now possessed by him,' the defender had been making use of the road in question as a cart-road : Finds, while the pursuer alleges that the use of said road by the defender was in consequence of a permission which he, the pursuer, granted to the defender's father, the defender, on the other hand, does not admit that any such permission was sought or obtained : Finds, in point of law, having regard to the above findings in point of fact, that the pursuer is not entitled to the declarator and interdict sought for by him in the prayer of his petition ; therefore refuses the prayer of the petition, and assizes the defender : Finds the pursuer liable to the defender in his expenses of process, in terms of scale ii. of the table of fees, subject to modification ; and decerns.

"W. G. SCOTT MONCRIEFF.

Notes.—Were this a question of right of way or servitude between a proprietor, or even a tenant, and the public, I should be inclined to hold upon the evidence led, that until the road in question assumed its present form under the operations of the pursuer, there was nothing which could be strictly called a cart-road passing through the pursuer's ground to the farm of Tombain. Upon this point a difficulty arises from the fact that many years ago the roads in this district were bad, that carts were few, and that those who drove them did not scruple to make tracks for themselves wherever it suited their convenience. But I think that until the pursuer improved the old path, which unquestionably existed from time immemorial, it was not regularly used for carts. Were it therefore such a question as I have suggested, the pursuer might be entitled to prevail. But here we have a state of matters which never, so far as I am aware, rose before. Two tenants are fighting for ground which belongs to neither of them. Without determining that in such circumstances a declarator is incompetent, it seems to me that the presumption of law is materially affected. It is, I think, to be presumed that this road which passes through both the pursuer's and the defender's farms, and is useful to both, is to be used and maintained by both, and when we find the fact of possession for many years by the defender established, coupled with the fact that he has assisted in maintaining the road, can it be said that the pur-

suer is now to exclude him by any such legal remedy as that which he now seeks? Perhaps the reported case which approaches most nearly to the present is that of *M'Donald v. Dempster* (18th November 1871, 10 Macph. 94), in which Lord Neaves remarked: 'Servitude is not the only category under which a right obtainable by one tenant over another tenancy may be classed. A right of access, for instance, running along the front of several houses, so as to form a kind of street, may, I conceive, be obtained by one tenant as against another by forty years' possession, and much less than forty years. Seven years might not be sufficient, but much less than forty years could do to infer a presumption that such a use of the properties had been arranged by consent.' Now, more than seven years prior to the date of the pursuer's lease by which he obtained his farm 'as now possessed,' the defender had used the road in question. As to the effect of such words, see *Gordon v. Renton* (14th November 1797, Hume, 798). No doubt the pursuer says this use was by permission, but we have only the pursuer's evidence upon the point. Is it not highly probable that this road having been to some extent made by both parties, the arrangement was that it was to be mutually maintained by them in the future, while both enjoyed its use. Be this as it may, I am not disposed to exclude the defender now after his long period of possession.

"While the defender is entitled to expenses, I see grounds for modifying the amount. I am not prepared to sustain all his pleas, nor to find that the whole of his evidence was necessary. Further, there is reason to believe that had the defender always used the road in such a way as not to prejudice the pursuer, this action would never have been brought. The pursuer is certainly entitled to have gates upon this road (*Wood v. Robertson*, 9th March 1809, F. C.), and the defender cannot make use of it in such a way as to injure his neighbour's property. W. G. S. M."

Act.—George—*Alt.*—Thurburn.

Notes of English, American, and Colonial Cases.

EXTRADITION ACT.—*Contempt of Court*—*Writ of attachment*—*Criminal offence*—*Arrest abroad under warrant*—*Detainer under writ*—*Abuse of procedure*.—Disobedience of an order of the High Court of Justice in a civil action, though a contempt of Court, is not an "offence" within the meaning of the 19th section of the Extradition Act, 1870, which applies only to political and criminal offences. Where, therefore, a party to a civil action in England was arrested in Paris under a warrant issued under the Extradition Act, and while in prison in England under the warrant, was served with a writ of attachment for disobedience to an order in the action,—*Held*, that the attachment was valid, and that he was not entitled to his discharge until he had purged his contempt, although he had been acquitted of the criminal charge on which he had been arrested.—*Pooley v. Whitham* (App.) 40 L. J. Rep. Ch. 236.

MASTER AND SERVANT.—*Negligence*—*Scope of authority*.—The plaintiffs, booksellers, occupied the basement of a house, and the defendants, a firm of solicitors, occupied the floor above. Water overflowing from a lavatory in the private room of one of the defendants, escaped through the floor to the basement below, injuring the plaintiffs' stock-in-trade. The overflow was caused by a clerk of the defendants', who, after the defendant W. had left for the day, had gone into the private room to use the lavatory, and had left the tap open. The clerk had no right to use the lavatory, and no business to go into the private room after the defendant W. had left, and the defendant W. had given orders to this effect:—*Held*, that the defendants were not liable, for that the act of the clerk was not incidental to his employment, and he was not acting within the scope of his authority.—*Stevens v. Woodward*, 50 L. J. Rep. C. P. 231.

THE JOURNAL OF JURISPRUDENCE.

HISTORICAL NOTES ON TITLES OF NOBILITY IN SCOTLAND.

NO. V.

ATTAINDER.

THE subject of forfeiture for treason is so often encountered in the history of Scottish peerages as to make a few remarks on it desirable.

The old Scottish law, far more rigorous than the law of England, was based on the Roman "*lex Julia*" with hardly any modification. The posterity of a traitor to the remotest generations could not hold lands or offices, or be witnesses or serve on an assize. The body of a deceased person who fell under suspicion of treason could be dug up, tried, and convicted, and the sentence of treason carried out on the lifeless remains "*ut, convicto mortuo, memoria ejus damnetur, et ejus bona successoribus ejus eripiantur.*" A familiar instance connected with the Gowrie conspiracy will occur to most readers. Not only were the Earl of Gowrie and his brother tried after their death, and their bodies drawn, hanged, and quartered; but the bones of Logan of Restalrig were, eight years after the occurrences at Gowrie House, and seven years after his death, exhumed for the same purpose.

Not merely did corruption of blood as recognised in England obtain also among us, but it was an absolute rule that no succession was competent either to or through a traitor. The children of a traitor, whether born before or after the treason, could not take lands or honours or succeed to anything through their unattainted mother, or by the will of third parties. When a convicted traitor succeeded to an estate, whether as heir-at-law or under an entail, it was not the next heir but the Crown who became entitled to it. An attainder irrevocably barred all succession direct or collateral, whether in entailed or unentailed lands, for all time coming.

This uncompromising severity was however modified in practice by the frequency of pardons and rehabilitations, which might be granted by the king alone, instead of requiring, as in England, an Act of Parliament: and the Supreme Court was, after the precedent of the Roman law, in the habit of allowing a provision by way of alimant to the traitor's widow and children.

Out of the *rapprochement* to England caused by the union of the crowns grew an inclination to mitigate the results of attainder as affecting third parties. Act 1663, c. 19, while recognising *quoad alia* all the disabilities of the issue of traitors, conceded to them the privilege of holding what property they might receive by the special favour of the sovereign. The more important Act 1690, c. 32, preserved the rights of heirs under strict entails made in accordance with the Act of 1685; this statute, however, does not seem to have had any original bearing on honours, and was not construed as applicable to them.

By a British statute of the year following the Union, 7 Anne, c. 21, the old treason law of Scotland was swept away from and after the 1st July 1709, and that of England substituted for it. The provisions of the English law were, as already said, far less severe, in theory at least; but the change involved the abolition of the prerogative of the Crown independently of Parliament to remove attainders. As the numerous forfeitures that followed the risings in favour of the Stewarts in 1715 and 1745 have given considerable practical importance to the treason law thus introduced, a brief account of its working in relation to honours may not be unwelcome.

In England, while all estates of inheritance were by 26 Henry VIII. c. 13, forfeited for the traitor and his heirs, it was otherwise in the case of entails with remainders over, in which, as Baron Hume puts it, "the estate or fee is held to be broken into portions, whereof that which belongs to the remainder-man, or as we should name him, the substitute heir called by description, is distinct from the interest of the present tenant in tail or possessor of the estate and his heirs, and appertains to him in his own proper and original though eventual right: it cannot therefore be forfeited by the treason of any other person" (Hume on Crimes, i. 547). In the application of the English law to Scottish destinations, according to the views which have been entertained by Committees of Privileges of the House of Lords in remits from the Crown, and generally acquiesced in, the substitutions in Scottish charters or patents have been treated as if they were the equivalent of English remainders over, though the analogy is not quite an exact one; and the questions which have arisen seem to have been regulated by the following principles:—

1. A title held under a destination to one class of heirs only, being identified with an English dignity in tail simply, is forfeited absolutely by the attainder of the possessor of it, or by its devolution on an attainted person, who is held to acquire for the Crown.

2. Where, again, the charter or patent contains limitations or substitutions, each introduced by the words "whom failing," each substitution is treated as a remainder over, which by the law of England constitutes a separate real right, vesting at once, though only coming into operation on the extinction of the previous estate. The effect of an attainder extends no further than the estate-tail to which the attainted person belongs,¹ and, on its extinction, the honours revive in favour of the representation of the next estate-tail.

3. The issue of an attainted person is not barred from succession, provided the succession has never opened to the attainted person himself so that he could have acquired it for the Crown.

The following are the chief occasions on which these rules have been applied to peerages of Scotland:—

Lord Sinclair, 1782.—The circumstances under which the title of Lord Sinclair passed from the original family to the Sinclairs of Herdmanstoun have been adverted to in a former article. The patent of 1677 was in favour of Henry Sinclair and the heirs-male of his body, with various substitutions, one of which was to Matthew Sinclair (uncle of the patentee) and the heirs-male of his body. The patentee's eldest son, John Master of Sinclair, was attainted in 1715, and survived his father, who died in 1723. In consequence of this attainder the honours were suspended not only during the life of the Master of Sinclair, but during the lives of his surviving brothers, who belonged to the same estate-tail. But on the decease of all the sons of the patentee without issue, the next heir-male, great-grandson of the already-mentioned Matthew Sinclair, claimed the title by petition to the sovereign, and was found to be in right of it, the resolution of the House of Lords, to whom the claim was remitted, reporting that he was unaffected by the attainder, as his claim arose out of a distinct remainder from that of the attainted Master of Sinclair.

Earl of Kintore, 1778.—Sir John Keith was made Earl of Kintore in 1677; and a charter granted on his resignation in 1694 devised the estates and honours to a series of classes of heirs, one of the substitutions being to George Earl Marischal (brother of the patentee) and the heirs-male of his body, and the next being to the daughters or heirs-female of William Lord Inverurie (son of the patentee) and the heirs male and female of their bodies. In 1761 the succession opened to George Earl Marischal (grandson of the above-mentioned Earl Marischal); but as he had been attainted in 1715, and reponed only to the extent of taking lands, not titles, he succeeded to the estates, the earldom of Kintore becoming forfeited.

¹ Where lands as well as dignities are involved, the estate, retained in the hands of the Crown as a base fee, can only be assigned to a third party conditionally. The remainder-man, in whose favour the right emerges by the extinction of the estate-tail to which the traitor belonged, may reclaim his right by law from the Crown and the assignee.

Kingdom), though both, as belonging to the same estate-tail, were involved in the attainder as in the Airlie case. The latter, however, in 1826 obtained, like the Earl of Airlie, an Act restoring him against the attainder.

JURISDICTION IN PEERAGE CLAIMS.

From the institution of the College of Justice in 1532 civil causes generally ceased to be competent either to the King and Council, or to the Lords Auditors appointed by the Parliament, and were entertained and decided by the Court of Session only as the supreme tribunal. This jurisdiction included questions regarding dignities, of the cognizance of which the sovereign—originally the fountain of honour—had thus divested himself.¹ Before the

¹ As English Law Lords in Committees of Privileges have occasionally expressed doubts regarding the jurisdiction in dignities being in the Court of Session before the Union, a few illustrative instances of it are given, which might easily be multiplied:—

Morton.—On 29th March 1542 the Court of Session, at the instance of James Earl of Morton, reduced a charter of the earldom of Morton, of date 1540, in favour of Robert Douglas of Lochleven, on the ground that the resignation on which it passed was made on compulsion. The decret contains strong expressions of a compromising kind against James V.

Arran.—In 1581 James Earl of Arran, son of the first Duke of Chatelherault, becoming insane, was induced by the royal favourite, James Stewart (a son of Lord Ochiltree), to resign the earldom to the Crown in his favour. James VI. sanctioning the transaction, reconveyed the earldom of Arran to Stewart by two charters, which were confirmed by Parliament. But in 1586 the denuded earl and his curators raised a reduction in the Court of Session, directed against the resignation, its acceptance by the king, and the confirmation by the king and Parliament, and praying that the pursuer should be reponed in all his honours, offices, dignities, and privileges. The defender failed to appear, and the insane earl was restored by the Court of Session to his previous status and title, the defender subsiding again into the position of Captain James Stewart.

Angus.—In 1588 the right to the earldom of Angus was litigated before the Court of Session between James VI. as heir of line and William Douglas of Glenbervie as heir-male, and awarded to the latter, who thereby became Earl of Angus.

Strathern.—In 1633 the Court of Session, at the instance of Charles I., reduced the service of William Graham, Earl of Menteith, as heir of David Stewart, Earl of Strathern (eldest son of the second family of Robert II.), and the patent or confirmation of the dignity granted in consequence of it, finding the right to that earldom to be in the king. "The Session in this instance," as Mr. Riddell remarks, "in the mere routine of their jurisdiction, finally denuded or disrobed a peer, as they had done before in the case of Arran."

Oliphant.—Laurence Lord Oliphant in 1631 resigned his honours, the original limitation of which was unknown, to his collateral heir-male Patrick Oliphant, to the exclusion of his daughter and heir of line, but died before the king had granted the contemplated charter in favour of the former. This daughter pursued a reduction of her father's resignation before the Court of Session, when the presence of Charles I. as a spectator was an open admission by the sovereign of the competency of the Supreme Court to entertain such causes. The Court found that the dignity, in absence of any contrary evidence, must be presumed to go to the heir of line, but that the resignation had so entirely denuded Lord Oliphant that it was in the sovereign's power to confer the dignity on whom he pleased.

Couper.—James Elphinstone, Lord Couper, in extreme age married a young wife, and resigned his honours and estates in favour of her and any whom she would marry. A Crown charter passed on the resignation; but in 1671 the Court of Session, on the petition of the next heir, John Lord Balmerinoch, reduced this

Usurpation, appeals from the Supreme Court to king or Parliament were unknown. The first attempt at an appeal to Parliament was made under the rebel Government of 1649; but the right of appeal to the House of Lords in modern times has been generally considered a development of the affirmation in the Claim of Right of 1689 of the right to protest to king and Parliament. Whatever irregularities there may have been in the way in which it was introduced—viewing the subject in a purely historical light—the right of appeal is at least legally a fact, and has operated beneficially.

It is about forty years since Mr. Riddell, in his valuable "Inquiry into the Law and Practice in Scottish Peerages," directed attention to the fact then almost forgotten, and still practically ignored, that the Court of Session was not deprived of its jurisdiction in claims to peerages at the Union. Article 18 of the Treaty of Union expressly reserves the "authority and privileges" of the Court of Session, which authority and privileges included, as has been seen, jurisdiction in claims to dignities, or, in modern phrase, peerages.

The same treaty, by article 22, established a system of representation of Peers, and by article 23 provided that while the sixteen Representative Peers shall have all the privileges of the Peers of England, all the Peers of Scotland "shall enjoy all privileges of Peers as fully as the Peers of England do now, or as they, or any other Peers of Great Britain, may hereafter enjoy the same, except the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and particularly the right of sitting upon the trials of Peers." This last provision has now and then been loosely referred to as if it authorized the present practice in peerage claims. But this idea, which is of recent growth, involves a palpable confusion between two distinct matters, the privileges of a peer acknowledged to be such, and the right to a peerage. Before the Union the privileges of an English peer were under the cognizance of the House of Lords; not so questions regarding the right to an English peerage. The claimant of an English peerage, then as now, submitted his case, not to the House of Lords, but to the sovereign. The new privileges acquired by Peers of Scotland under article 23 in like manner come under the cognizance of the House of Lords; but the right to a Scottish peerage continued to be

charter as inept on the ground that the resignation on which it proceeded had been granted on deathbed.

Caithness.—Charles II. having been induced to confer the earldom of Caithness in 1677 on Sir John Campbell of Glenorchy "upon gross and false misrepresentations," on becoming aware of the injustice of his act, resolved to annul the patent and confirm the lawful heir, George Sinclair, in the dignity. But before doing so he required the two parties to go to the Court of Session "to pursue their pretensions as use is in such cases," without a decision of which Court it was considered that the patent could not competently have been recalled.

After the punctilio of precedency according to antiquity of creation gained acceptance, questions of precedency among Peers were discussed before the same forum, as shown by the records of the Supreme Court and by the reservation in the Decreet of Ranking to parties aggrieved by it to have recourse to the ordinary remedy of reduction before the Court of Session.

determinable by the Supreme Court of Scotland, under the jurisdiction already described as preserved inviolate at the Union.¹

It will presently be shown that the power of the Court of Session to determine rights to peerage continued in exercise after as before the Union; but it falls in the meantime to be related how, soon after the Union, attempts were made both by the House of Lords and by the Government to dictate to and control the action of the Peers, contrary to both letter and spirit of that treaty. The General Resolutions, alluded to at the close of our last paper, regarding Peers of Scotland who had been made Peers of Great Britain by special creation, were early symptoms of this tendency. The records of the election of the sixteen Representative Peers show how the Government of the day habitually dictated who should be elected, its interference once including the marching of a body of troops from Leith to the Abbey Court to coerce the assembled Peers.²

An attempt made by the House of Lords in 1714 to exercise direct jurisdiction in a Scottish peerage claim must be allowed on all hands to have been an indefensible encroachment. The title of Lord Dingwall, which had been dormant ninety years, and was not on the Union Roll, was claimed by the Duke of Ormonde; when the House, taking the case up *proprio motu*, decided, on a report by the Committee of Privileges, that the claimant had made out his case. Such a proceeding would have been thoroughly unconstitutional in the case of an English dignity, where the claim lay to be made to the Crown, and the House of Lords could only entertain it as a Commission of Inquiry in virtue of a special remit from the sovereign. It was still more unwarrantable in the case of a Scottish dignity; and the precedent has never been repeated.³

The first two cases in which the claimant to a Scottish peerage petitioned the sovereign in English form, and was remitted to the House of Lords, occurred in 1723, and related to titles not on the Union Roll. One of them was the claim of James Somerville of Drum to the title of Lord Somerville, dormant before the ranking of 1606, the other that of Lord Colville of Culross.

On the other hand, in 1730 the Court of Session, at the instance of the heir-male to the title of Lord Lovat, reduced a decret which it had granted in absence in 1703 in favour of the heir of line.⁴ In 1747 the successful competitor, Simon Lord Lovat,

¹ In reference to this confusion of ideas, George Wallace, in his "Nature and Descent of Ancient Peerages," says, "It was only lately that Scottish lawyers were taught to number among the privileges acquired to the Peers of Scotland by the Union, that of subjecting their legal pretensions to the arbitrary decision of the Crown."

² Robertson's Proceedings relating to the Peerage of Scotland, pp. 141-144, 152, 155, 161-176, 387, 378-387.

³ While this inquiry was pending, Lord Dingwall twice voted at Holyrood, when no objection was taken to his vote.

⁴ The judgment of 1730, it may be remarked, was based, not (as Lord Mansfield asserted in his opinion in the Sutherland case) on a general presumption in favour of heirs-male, but on an exception to the legal presumption in favour of heirs of line constituted by the investiture of 1539 (Riddell's Peerage Law, p. 371).

was tried by the House of Lords, condemned, executed, and attainted as a peer, solely in virtue of this decision of the Court of Session.

In 1733 the Court of Session entertained a declarator at the instance of one of two rival claimants to the viscounty of Oxenford. The defender, who on the merits could only plead wrongful assumption, sought, as Mr. Riddell describes the proceeding, "to evade the discussion and keep things still *in dubio* to his adversary's detriment, by objecting to the competency of the judicature, which seems to have been his sole resource." It was his privilege, he asserted, as a Peer of Great Britain, to have his claim tried by the House of Lords, wrongly presuming such to be the English practice. The Court unhesitatingly sustained its competency, on the ground that the privilege of a peer was something entirely different from the right to a peerage. The detailed pleadings and further history of the case, as given from original sources in Riddell's "Peerage Law" (pp. 295 *et seq.*), are very instructive. The matter was allowed to drop; and a petition to the sovereign was afterwards resorted to with a view to avoid delay and expense (such a proceeding was then far less costly than a Court of Session action), with apparent misgivings as to the competency of the petition, but none as to the jurisdiction of the Court of Session.

In 1740 the Court of Session, in an official Report regarding the Scottish Peerage made on an Order of the House of Lords, adverted to its exercise of jurisdiction in the Lovat case, and asserted its competency to deal with and decide similar cases in future.¹

This Report, as well as the Lovat and Oxenford precedents, are the more weighty that they were subsequent to the Dingwall, Somerville, and Colville of Culross cases. Had any real doubt been entertained about the competency of jurisdiction in either of the cases, there would probably have been an appeal on the point, which there was not. But a concurrent jurisdiction existing in the sovereign is all that was or could have been then maintained; and the only possible ground on which the practice which has since become general can be vindicated is the acquiescence of the Scottish Peers.

A few later cases may be mentioned in which the Court of Session exercised jurisdiction in peerage questions. In 1745, at the instance of John Earl of Breadalbane, it sanctioned the registration in the record of the Great Seal of his father's patent of peerage of date 1681; and in 1764 it similarly authorized a patent of peerage to Lord Rollo of date 1654 to be recorded, ruling in both cases that the patent was a genuine document, which regulated the succession to the dignity, and therefore deciding a proper peerage case. In 1790 the Court of Session entertained the question of the right of Sir James Sinclair of Mey to the earldom of Caithness, allowing the freeholders of Caithness to prove that he was in legal

¹ Robertson's Proceedings relating to the Peerage of Scotland, p. 219.

possession of that dignity (which he had not yet assumed) as a ground for excluding him from their roll.

Questions regarding precedence arising out of protests made in Parliament were, as has been seen, competent to and entertained by the Court of Session before the Union. At the Union several of these protests stood on the records of the Scottish Parliament; and the Union Roll was received by the House of Lords with an express reservation of their validity.¹ Processes for precedence therefore remained as competent to the Court of Session as before; and one of them, carried on at intervals by the Earls of Sutherland against Peers who were ranked above him in 1606, but never decided, was resuscitated by a summons of wakening in 1746; regarding which it falls to be remarked that the House of Lords recognised the validity of this wakening by giving intimation to the Earls of Crawford and Erroll, as parties interested in the claim of Elizabeth Countess of Sutherland in 1770, and by appointing counsel to be heard on their behalf.²

The procedure of an English and Scottish peerage claimant necessarily differs in this, that the former craves a writ of summons under the title claimed, while the latter only prays for the recognition of his right to the dignity. But there is also the following essential difference in the further proceedings to the disadvantage of Scottish claimants. In an English case the Crown in the first instance refers the petition to the Attorney-General to report. If the report be favourable, the claim is at once admitted; if unfavourable, refused: and it is only on that officer reporting the case to be one for further inquiry that it comes, along with his report on it, under consideration of the House of Lords. In a Scottish case, on the other hand, the House, or its Committee of Privileges, enters on consideration of the claim without any previous report of the Crown law officers, whose opinion is only expressed at a later stage;³ and one Scottish instance might be named in which, not-

¹ Robertson's Proceedings relating to the Peerage of Scotland, p. 12.

² Journals of the House of Lords, 16th March 1769 and 12th March 1770.

³ The following two examples of the form of remits in claims to peerages of England (or the United Kingdom) and Scotland will illustrate this difference:—

BUCKHURST PEERAGE.

WHITEHALL, *May 15, 1876.*

Her Majesty being moved upon this petition, is pleased to refer the same (together with the report of her Majesty's Attorney-General thereon) to the Right Honourable the House of Peers, to examine the allegations thereof as to what relates to the petitioner's title therein mentioned, and to inform her Majesty how the same shall appear to their Lordships.

RICH. ASSHETON CROSS.

DYSART PEERAGE.

WHITEHALL, *July 14, 1880.*

Her Majesty being moved upon this petition, is graciously pleased to refer the same to the Right Honourable the House of Peers, to examine the allegations thereof as to what relates to the petitioner's title therein mentioned, and to inform her Majesty how the same shall appear to their Lordships.

W. V. HARCOURT.

withstanding an adverse opinion of the Crown law officers, English and Scottish, the House, guided by the Committee of Privileges, reported to the Crown in the claimant's favour.

The procedure by petition to the sovereign has no longer the recommendation that it had at the time of the Oxenford claim, of being less costly than a declarator in the Court of Session; but of its admitted disadvantages the greatest is the unfamiliarity with Scottish peerage law of the acting members of the Committee of Privileges, even such of them as may have acquired a high reputation as English lawyers. Questions the understanding of which presupposes a minute previous acquaintance with Scottish records and much study of the law of Scotland from its historical side, are discussed by English counsel before English Law Lords with no better guide than the dicta of former Law Lords pronounced under similar disadvantages, dicta too often allowed to outweigh the testimony of Scottish records and Scottish institutional authorities, and the precedents to be found in decisions of the Supreme Court of Scotland during the period when Scotland had a separate national existence.

Usage and acquiescence being, then, the grounds on which the present procedure by petition to the sovereign and remit to the House of Lords are based, the question arises, Can that usage so derogate from the jurisdiction of the Court of Session that it is no longer competent to entertain, or, we should rather say, bound to entertain, peerage claims, if brought before it?

Mr. Riddell in his "Peerage Law" (pp. 307 *et seq.*), after quoting two passages from Erskine and Bankton regarding the circumstances under which alone statutes can fall into desuetude, draws the following among other inferences: "That the enactment of the 19th article of the Union, as regards the matter of honours, cannot be affected by the non-usage of the Session. Neither can the contrary usage of the jurisdiction in question by the House of Peers from 1723 downwards, while the Session still continued it in 1730 and 1733, and, it may be said, to 1764, constitute or amount to *immemorial* custom, which obviously is regarded by Erskine, and indeed, according to the genius and practice of our law, to defeat the force of an inferior though not *public* statute in one sense. The partial non-usage alluded to was owing likewise to no fault or omission on the part of the Session: it was quite *ultra vires* of that body, and could not admit of check, when claimants thus chose to prorogue and so far homologate an extraneous cognizance. *Pactis privatorum non derogatur juri communi.*

"To exclude and nullify the effect of these concurrent circumstances in favour of the Session there must be . . . a new and special Act of Parliament peremptorily abrogating their jurisdiction in so far as extends to peerages."

It is certainly difficult to gainsay Mr. Riddell's argument; and should a claimant of a Scottish peerage bring his case before the

Court of Session, and have the question of jurisdiction fully argued, it is not for us to say what effect that Court would or would not give to desuetude, the only possible plea for declining jurisdiction. Be that, however, as it may, the anomalous origin of the present practice suggests that Scottish peerage cases should at least not be placed at a disadvantage in comparison with English. "On the analogy," says Lord Crawford, whose views are nearly identical with those of Mr. Riddell on this subject, "of the usage of consulting the judges on difficult points of law affecting English peerages, the House of Lords, advising the Crown, ought *a fortiori* to consult the judges of the Court of Session on questions of Scottish law affecting dignities, and frame their reports accordingly. That they did not so consult Scottish judges, especially in 1762 and 1771, has been the fruitful source of evil and injustice."¹

AN ARMORIAL CASE.

HUNTER *v.* HUNTER-WESTON.

CASES involving the right to coat-armour or the jurisdiction of the Lyon Court so rarely diversify the proceedings of the Court of Session that the action decided on the 31st January 1882, between Miss Margaret Hunter, pursuer, and Mrs. Jane Hunter-Weston of Hunterston and her husband, Colonel Gould Read Hunter-Weston, defenders, deserves a brief notice, were it only as one of the curiosities of jurisprudence.

In the case of *Cuninghame v. Cunyngham* (June 13, 1849) the question was brought up by advocacy from the Lyon Court, whether Sir R. K. Dick Cunyngham, Bart. of Prestonfield, the heir-male, or Mr. Smith Cuninghame, the heir of line, of Sir John Cunyngham of Lambrughton, was entitled to certain arms and supporters. Much curious lore was brought to bear on the subject by the respective counsel, Mr. Mark Napier and Mr. Cosmo Innes; and the First Division, affirming the interlocutor of the Lord Ordinary, reversed Lyon's judgment.

The case recently decided was of a different complexion, inasmuch as it did not, directly at least, involve a review of a decree of the Lyon Court. It was a declarator of irritancy pursued by the sister of the late Robert Hunter of Hunterston, as a substitute heir of entail of that property, against her niece, the heir of entail in possession, and the husband of the latter. Mrs. Hunter-Weston and her husband had, it was alleged, incurred an irritancy by contravening the conditions of the entail under which they possessed Hunterston, inasmuch as while the entail obliged the heirs in possession, and the husbands of female heirs, to use "the surname

¹ Lord Crawford's Earldom of Mar, i. p. 104.

of Hunter and coat armorial of the family of Hunterstoun," they neither used the surname of Hunter nor the arms which, according to the pursuer, were the proper arms of Hunter of Hunterston. The defenders; on the other hand, maintained that they did use the surname of Hunter and also the proper coat armorial belonging to the family, as confirmed both to them and to the late Robert Hunter of Hunterston, father of Mrs. Hunter-Weston and brother of the pursuer, by Lyon King of Arms, who has the sole jurisdiction in questions of armorial right.

It seems strange that the question of surname should ever have been brought into Court, inasmuch as the obligation was not to bear the name of Hunter *only*, or as a last name, but simply to bear the surname of Hunter, a condition which was beyond doubt equally fulfilled by using as surname Hunter only, or Weston-Hunter, or Hunter-Weston, the last being the order in which the surnames were actually used by the defenders.

Nor did the question of arms seem to admit of serious doubt, though it involved subjects less familiar to the ordinary Courts of law. Though the Hunters of Hunterston had been a family of position and note in Ayrshire since the fourteenth century, considerable dubiety existed as to their proper arms, which in fact were variously borne at different times, and had not been recorded in the Lyon Register either in 1672 under the Act of that year, which made such registration compulsory, or at any subsequent date prior to 1810. An heir-female who succeeded in 1796 married Mr. Robert Caldwell, who took the combined names of Caldwell-Hunter. Mr. Caldwell-Hunter in 1810, in implement of an obligation in his marriage contract, executed the entail above alluded to, and a few days previous to doing so had the family arms matriculated, i.e. recorded, in the Lyon Register as "Vert, three dogs of chase courant argent collared or, on a chief of the second three hunting-horns of the first stringed gules."

Robert Hunter of Hunterston, son of the entailer and father of Mrs. Hunter-Weston, bore these arms till 1865, when, satisfied that they were not the ancient insignia of the family, he applied for Lyon's authority to revert to the older and simpler coat, "Or, three hunting-horns vert garnished and stringed gules." The present Lyon King of Arms (then Lyon-Depute), after carefully examining all the attainable evidence on the subject, was satisfied that Mr. Hunter was right in his contention as to what the old coat of the family was; and the last-described arms were accordingly by his authority matriculated in the Lyon Register in substitution for the coat of 1810: and the same coat was more recently confirmed by Lyon's authority to Mr. and Mrs. Hunter-Weston on their succession, and exemplified quarterly with the arms of Weston. The defenders, in fact, did all, if not more than all, that the law could possibly require as to complying with the armorial condition in the entail. Colonel Weston obtained the royal licence to adopt the additional

name of Hunter, and had his quartered coat recorded in the books of the English Heralds' College as well as in the Lyon Register.

The defender pleaded that the arms meant by the entail must be presumed to be the historical arms of the family, and that it lay with Lyon, and not with either pursuer or defender in the exercise of their private judgment, to determine what these were. An awkward fact for the pursuer transpired, namely, that she had herself used the arms which she now repudiated, and had caused them to be represented on the tombstone of her sister in 1870.

Lord Adam, before whom the case came as Lord Ordinary, found that the obligation in the entail had not been contravened either as to name or arms, assolizied the defenders, and found them entitled to expenses.

The defenders reclaimed, the case came before the First Division ; and Mr. Pearson having been heard for the pursuer, and Mr. J. P. B. Robertson for the defenders, the Court adhered with additional expenses.

In giving judgment, the Lord President said:—

“The questions as to the adoption of the name of Hunter and the wearing of the coat armorial of the family are different. As regards the name, when an entail directs that his heirs of entail shall use a certain surname, that may be understood in different senses according to the circumstances of the case. The name may be assumed by the heir as his only surname, or in addition to another name, putting the assumed name last, or along with one or more surnames, putting these in some order in which the assumed name shall not be the last. The question is, whether the entail has required more than that the name of Hunter shall be assumed, there being no more precise condition inserted in the deed. It is clear that that condition is sufficiently complied with if the name be assumed in any of the ways to which I have referred, and therefore that part of the complaint is entirely unfounded.

“As regards the part of the case which deals with the coat armorial, there are other considerations which require to be dealt with. The complaint of the pursuer is that the coat of arms now adopted by the defenders is not the proper coat of the Hunterston family. She says that the coat of arms which the Hunterston family now bear was assigned to Mrs. Hunter-Weston's father by the Lyon King of Arms in 1865, but that Lyon was misinformed and misled by the heir of entail who asked to have the coat assigned. That is not a very intelligible statement, because it must be taken for granted that Lyon knows more about coats of arms than any other person, whether the heir of entail or some one else. He is the proper officer for the purpose, and by his judgment and authority any one who bears the coat armorial is bound. And I know of no authority for taking to another Court, and bringing up as a side issue, the decision arrived at on such a point by the Lyon King, without having in the first place had recourse to the regular pro-

ceedings by which such a decision can be reviewed. There have been cases in which the judgment of the Lyon King has been brought under review by advocacy or reduction, and if a party has a proper interest he will be entitled to be heard upon the merits on such a matter. But to disregard as unimportant the judgment which was pronounced upon this matter in 1865 is unprecedented; and I do not see how any judgment could be pronounced which could effect the pursuer's purpose, without involving a reversal of the decree of 1865, and determining what are the proper insignia of the Hunter coat armorial. As the matter now stands, no one is entitled to use any other coat armorial than that settled by the decree of 1865, and if he did he would render himself liable to the penalties specified in the Act of 1672. It would be a strong thing if we were to direct this heir of entail to revert to the coat armorial which was borne by the family previously to 1865, and were thus impliedly to subject him to the penalties imposed by the Act of 1672 as a condition of his holding this estate. Yet that is what the contention of the pursuer amounts to. As the case stands, it must be assumed by the Court that the true coat armorial of the Hunterston family is that conferred by the patent of 1865.

"But it is further said that when Mrs. Hunter-Weston succeeded in 1880 there was a tampering with the coat armorial of the defenders by quartering it with the coat of the Weston family, and that thus there has been a contravention of the entail. That contention is not raised upon record, which is one objection to it. But I am unwilling to give it no further answer, because I am very clearly of opinion that Colonel and Mrs. Hunter-Weston could do nothing more than what they did, and that what they did they did rightly. We are told that in 1880, when Mrs. Hunter-Weston succeeded to the estate, her husband, desirous of fulfilling 'in the most full and formal manner the conditions of the entail, obtained, as an Englishman, through the College of Arms in England, the royal licence to assume and use the surname of Hunter and the coat armorial of the family of Hunterston in addition to his own, the surname being prefixed and the arms quartered in the second quarter. In obedience to the royal commands, the Garter King of Arms forwarded to the Lyon King of Arms a certificate that the right of Lieutenant-Colonel Weston to bear arms was recognised in the College of Arms in England, and Lyon transmitted to Garter an exemplification of the coat of the family of Hunterston. Due record of the quartered arms was made in the College of Arms and in the Lyon office, and patents were issued therefrom in favour of Lieutenant-Colonel Hunter-Weston and his wife.' It is said that in order to comply with the terms of the clause of entail it is not enough to use the Hunter arms quartered along with the arms of another family, but that the arms of Hunter of Hunterston must be used alone. That is a matter upon which one wishes to have

authority, and the only authority which has been quoted is a very direct and conclusive one against the pursuer. Sir George Mackenzie says, 'The learnedest antiquaries and lawyers (who call quartering *cumulatio armorum*) do observe that the quartering of coats did proceed at first from the vanity of kings and princes, who added the arms of the conquered or acquired kingdoms to these which they bore formerly; . . . and they conclude that when a person leaves his estate to another upon condition that he shall bear the disponent's name and arms, he who is to succeed is not by condition obliged to lay aside his own name and arms, but may quarter his own arms with these of the disponent, except the disponent do in the institution prohibit the bearing of any arms beside his own; . . . and the heir in marshalling his own and the disponent's arms may use what order he pleases by giving the first quarter either to his own or to the disponent, except the contrair be expressed in the institution.' No doubt that quotation is applicable to a person succeeding in his own name to an estate destined to him under such a condition; and in the present case we are dealing with an heiress of entail and her husband; and, according to the contention of the pursuer, this paragraph is not applicable to the present case. Her counsel says that it is the paragraph which follows which ought to regulate the present case, and that when a man assumes the arms of his wife the way to emblazon the shield is to impale and not to quarter the arms of the two families. Now, it would be rather a remarkable conclusion if the Court were to hold that upon such a matter Garter and Lyon are wrong, and they must be wrong if the contention of the pursuer is right. I am not disposed to impugn their authority, and am of opinion that the Lord Ordinary's interlocutor ought to be adhered to."

Lord Deas considered that the irritancy clause is to be construed as stringently as any other irritancy under a deed of entail; and as to the name, agreed that the condition may be observed either by making Hunter the only surname, or by using it as one of several surnames, either first or last. "There is nothing in the entail to show that the surname of Hunter *and no other* is to be used. As to the coat armorial, it has been found by the proper authority that that borne by the defenders is the proper coat of the family of Hunter of Hunterston, and the arms of Hunter and Weston are duly quartered by the authority of Lyon and Garter. I do not see any ground for holding that both Lyon and Garter are wrong; and I agree that before we can ordain the defenders to revert to the coat armorial used prior to 1865 it will be necessary to have the patent issued in that year by Lyon reduced."

Lord Mure: "I have come to the same conclusion. The words of the entail are very clear, and quite insufficient to imply any obligation upon the husband to abandon his own name and adopt Hunter exclusively. The law is thus stated in the last edition of Mr. Bell's 'Lectures on Conveyancing,' p. 1017: 'We have in general

first an obligation to bear the surname, arms, and designation of the entail. If it is intended to preserve a separate representation, the word "only" will be added, or the words "and no other name, arms, and designation." Without these restrictive words the heirs may conjoin any other surname, arms, and designation with those prescribed by the entail. The word 'alone' or 'only' not being found in the clause here in question, and there being no other similar words of limitation, I think that the pursuer must fail in this ground of action. As regards the armorial bearings, it appears to me that there is nothing to prevent the defenders from using those which have been sanctioned by Lyon King of Arms and Garter King of Arms. I do not think that we can here call in question the decision of these authorities."

Lord Shand concurred.

NOTES IN THE INNER HOUSE.

THE case of *Walker v. Bryce* (December 6, 1881, First Division) has decided a very important question arising under the Debtors (Scotland) Act of 1880. Section 4 of that Act, after stating the class of debts for which imprisonment is still retained, provides "that no person shall be imprisoned in any case excepted from the operation of this section for a longer period than twelve months." The pursuer, Walker, had been incarcerated under an alimentary decree for the support of an illegitimate child in the prison of Ayr upon 21st August 1880. When the year expired a new warrant of imprisonment following on a charge to pay the aliment for next quarter was served upon him in prison. He raised a process of suspension, and pleaded that detention for more than a year was illegal under the recent Act. The Lord Ordinary (M'Laren) granted liberation. In his opinion "the natural and obvious reading of the statute is that which makes the word 'case' synonymous with decree, and this interpretation is supported, if support be necessary, by the antecedent part of the clause, in which the power of imprisonment is reserved in relation to sums decerned for aliment. . . . I am therefore of opinion that the two warrants of imprisonment issued against this complainer are truly warrants applicable to the same case within the meaning of the statute, and that an aggregate period of imprisonment under the two warrants must be limited to twelve months. Any other construction would enable the creditor by successive warrants to detain the debtor, if not possessed of independent means, for the whole period of ten years, and would defeat the plain intention of the statute."

But the Inner House took quite a different view. In the opinion of the judges of the First Division, each term of aliment forms a new debt, rendering the debtor liable to a fresh period of imprison-

ment. "There is another aspect of the case," observed the Lord President, "and that is, if a person who is liable to pay aliment for seven or ten years is to be imprisoned for the first term, and after that is to be free from all claims upon him for aliment, the effect would be that the section about imprisonment for aliment would become nugatory altogether." He meets the objection, that the view which he held might lead to perpetual imprisonment, by pointing out that the prisoner has still the remedy of *cessio*.

The question is certainly a nice one, with much to be said on both sides. It is somewhat surprising that if the Court have rightly interpreted the meaning of the framers of this Act, that meaning was not more clearly expressed, seeing that from the nature of the debts excepted this question was very likely to arise.

In *Grant v. Fleming* (December 10, 1881, Second Division) a question which was raised in *Sandys* (November 26, 1874, 2 Rettie (Just. Cases), 7) came before the Court, viz. Has the Debts Recovery Act a wider scope than that of 1579, c. 83? It was an action for payment of disbursements alleged to have been made by the pursuer on account of the defender, who pleaded the triennial prescription, and as an alternative plea, that, if this prescription did not apply, the action was incompetent in the Debts Recovery Court. The Sheriff-Substitute repelled both pleas, and decerned against the defender upon the merits. This judgment was adhered to by the Second Division. Speaking with reference to the second plea, the Lord Justice-Clerk said, "In regard to this latter point, no doubt obscure enough, questions may arise under the statute if we go strictly to work; but it is obvious that the intention of the statute is that it should apply to small accounts arising amongst dealers in the ordinary way, and its purpose is to give a cheap remedy for their recovery, and I do not think it was the least intended to limit to such debts as would have fallen under the Triennial Prescription Act of 1579." Lord Young, while remarking that the Debts Recovery Act is "certainly oddly enough expressed," held the point to have been settled in *Sandys'* case. He had more difficulty about the other plea, and remarked, "I should have felt it my duty to dissent but for the view which your Lordship has adopted, that the Sheriff has—on evidence which we think reasonably supported—decided that the sum concluded for is composed of advances under the defender's mandate, and there is authority for holding that the Act of 1579 is inapplicable to such. Thinking in this way, I do not dissent. In the more general view, I do not think a writer would get rid of the Act of 1579 by limiting his account to outlays. I do not mean large sums advanced, but to deeds and writings copied by the clerks, and to payments to porters, and other charges of the same kind.

In *Macpherson v. Haggarts* (December 15, 1881) the Second Division, reversing Lord Lee, have found that it was incompetent to prove by parole that a cautionary obligation had been entered

into by two of the obligants only until a supplementary and valid guarantee should be given by another who was in minority at the date of their signature. Lord Young said, "There was no room for parole evidence at all, and that submitted to us was, in my opinion, incompetent from beginning to end." Lord Lee's authority for allowing a proof before answer was mainly the case of *Thorburn v. Howie* (July 18, 1863, 1 Macph. 1169), in which an inquiry was allowed into the circumstances under which a bond of corroboration had been granted. But it will be observed upon turning to the report of this case that there were documents held sufficient to warrant the opinion arrived at by the Court. The judgment is delivered by Lord Deas, who says, "I shall take the case on the written documents alone." He indeed adds, "I would be slow, however, to affirm that parole proof is altogether incompetent in such a case. Mere verbal communings or statements may be so. But it does not follow that facts and circumstances of real evidence may not be ascertained even by parole testimony in aid of the construction of written documents." But this unsupported and cautiously-worded opinion of Lord Deas is hardly an authority for the admission of parole evidence.

In *Haggarts v. Macpherson* (March 15, 1881) the First Division held that a compromise of the action had taken place, because the pursuer had by minute on 8th January accepted an offer made by the defenders upon record, although on 15th February the defenders withdrew this offer. "This," said the Lord President, "is an acceptance precisely in the terms of the offer, and therefore, unless something intervenes to prevent the offer and acceptance having their effect, they must receive their effect.

In *Murray v. Brown and Porteous* (December 16, 1881, First Division) the question was raised whether, under the Act (26 and 27 Vict. c. 100) for protecting sheep from the ravages of dogs, it is necessary to aver and prove fault on the part of the owner. Section 1 of that Act modifies the common law to the following extent: "In any action brought against the owner of a dog for damages in consequence of injury done by such dog to any sheep or cattle, it shall not be necessary for the pursuer to prove a previous propensity in such dog to injure sheep or cattle." Lord Mure said, "I think it is still necessary to allege fault on the part of the owner of the dog, and that that has been here alleged and sufficiently proved." And the Lord President agreed that the interlocutor ought to include a finding of fault. Lord Shand, referring to a previous opinion of the Lord President, delivered in the case of *M'Intyre* (8 Macph. 570), to the effect that the statute is not clear upon this point, remarked, "As a second case has now come up which raises the same point, and we have now to repeat that the words of the statute are unsatisfactory, it may be for the consideration of those in whose hands such matters are placed whether our law should not be put upon a clearer footing."

Baird & Co. v. M'Monagle (December 17, 1881, Second Division) is one of the first cases decided by the Supreme Court under the Employers Liability Act of 1880. The Court have held that a workman is not barred from recovering damages although he had gone on working in the knowledge of the danger. He had called the attention of the oversman to what he considered insecure, and the latter had told him to work away and he would get the matter put right. Under the Act, damages cannot be recovered where the workman knows of the defect, and has failed to give within a reasonable time information to the employer or oversman.

All lawyers know that a *fugæ* warrant is a very delicate legal machine to deal with. An illustration of this fact is afforded by the case of *Clark v. Bremner* (December 21, 1881, First Division). The circumstances of this case may be learned from the following passage in the Lord Ordinary's note: "It has long been settled that the cautioner is entitled to be freed from his obligation by producing the debtor at a diet of Court, and protesting that he has fulfilled his obligation. The debtor is then liable to be imprisoned as *in meditatione fugæ* if he fail to find caution a second time, whether by the judge in a special application for this purpose or by the creditor at his own hand. In the present case the creditor has proceeded on the assumption that the original warrant of imprisonment was a continuing warrant, and accordingly, on an interlocutor being pronounced discharging the cautioner, he caused the debtor to be imprisoned on that warrant without obtaining the authority of the Sheriff." The case came before the Court of Session by way of a note of suspension, and it was remarked by the Lord President that the question raised had never certainly in terms been decided before. The Court, however, seem to have arrived without difficulty at the conclusion that the original warrant was insufficient, and that imprisonment had improperly followed upon it. The authority quoted in support of the course pursued was the case of *Forgie*, reported in 3 Rettie, 1149. A debtor who had been liberated under the operation of the Act of Grace unknown to the incarcerating creditors, who held a decree against him, was afterwards put in prison by them under the old warrant, and the legality of this proceeding was sustained. The Lord Ordinary, however, points out, "The judgment in the case of *Forgie* was not intended to be applied to a case like the present, where the imprisonment is not in execution of a decree, but is awarded in the exercise of a discretionary power, and for the purpose of enforcing the appearance of the debtor *judicio sisti*." In support of the view taken by the Court in *Clark's* case there is the authority of *Douglas* (5 D. 338), in which the Lord Ordinary was instructed to grant warrant of incarceration of new.

In the case of *M'Donald v. M'Donalds* (January 7, 1881, recently reported) Lord Fraser has given an important decision upon the question whether or not the official of an insurance company can

refuse to furnish medical reports furnished to his office upon the plea of confidentiality. He has decided the question in the negative, although he points out that "the tendency of modern decision is to increase the class of cases coming under the category of privileged communications. It has never been decided in Scotland that a medical man or priest is bound to reveal the secrets committed to him by patient or penitent. He remarks, "An insurance company in the course of its business requires to obtain information as to the health of the person wishing to deal with it, promising, at the same time, to the doctor who gives the report that it will be treated as a confidential communication." This does not possess any of those elements which lie at the root of the protection given to the classes above referred to.

In the case of *Stronach and Others* (December 23, 1881) Lord McLaren has decided that the provisions contained in the 95th section of the Court of Session Act of 1868, and the 30th section of that of 1880, relating to the wakening of actions, do not apply to undefended suits; that in such cases it is necessary to raise a summons of wakening.

In *Anderson v. Lattimer* (December 20, 1881, First Division) the Court have again given a liberal interpretation to the Act of Sederunt of March 1870, under which it is necessary for appellants to box within fourteen days after the process has been received by the clerk of Court the "note of appeal, record, interlocutors, and proof." Here the appellant, through the mistake of his agent, had failed to lodge his proof. The Court repelled an objection to the competency of the appeal. We may here note the previous cases. In *Young v. Brown* (2 Rettie, 456) it was objected that the appellant had failed to include in the print the note of appeal. The objection was thought too narrow and critical, although admitted to be good according to the letter of the Act of Sederunt. In *Walker v. Reid* (4 Rettie, 714) prints were not lodged timeously, the agent having by mistake, as the day for lodging fell in vacation, lodged them on the box-day instead. Lord Gifford said, "I think the power of giving such relief in cases of accidental failure to comply with the Act of Sederunt must always inhere in the Court." In *Muir v. Mackenzie* (19 S. L. R. 3) it was held unnecessary under this Act of Sederunt to box along with the other papers documentary evidence forming part of the proof. On the other hand, in the case of *Robertson v. Barclay* the Act of Sederunt was strictly enforced. But in that case, as the Lord President remarked, "the appellant had taken no step—he had not even attempted to take any step—to print and box the appeal, and it was thus held that he had no excuse at all, except an obviously trivial attempt to palliate his default on the ground of some verbal and half-hearted communications between the parties with a view to a settlement." In *Anderson v. Lattimer*, although the appellant was permitted to proceed, he was found liable in modified expenses.

The case of *Hennigan v. M'Vey* (January 12, 1882, Second Division), which has already formed the theme of some exceedingly clever and humorous verses in this Journal, raises two questions. The first of these is, whether, where injury has arisen from the action of such an animal as a boar, it is necessary to prove knowledge of its savage character upon the part of its owner. The Sheriff-Substitute held that it was; that "the boar is an animal *mansuetæ naturæ*, and accordingly its owner is not liable for any injury which may result from any sudden or unusual display of ferocity due to excitement and contrary to its natural habits." The Sheriff thought differently. It appeared to him "that the case of a boar left at large is more analogous to that of a bull or a horse than to the case of a dog." With him agreed the Lord Justice-Clerk, who said, "I should have thought that it is a matter of common knowledge that a boar, although it may in a sense be a domestic animal, is certainly not *mansuetæ naturæ*, and that upon the slightest provocation it will do such mischief as it did in this case." Then came the question, Was there fault upon the part of the injured person? The injuries had been received by him while in the act of driving the boar out of his garden with a stick. The Sheriff-Substitute of course held there was. With him the boar was a tame animal, only excited by the reception given to its trespass. The Sheriff, however, held that the pursuer had only been defending his own property, and that no such amount of rashness had been proved as to disentitle him to damages. Lord Rutherford Clark was the sole judge in the Supreme Court who seemed to sympathize with the view of the Sheriff-Substitute. It humbly appears to us that the judgment arrived at is, with all respect, open to a charge of inconsistency. If the boar was not *mansuetæ naturæ*, but an animal of a dangerous character, was it not rash in the pursuer to attack him? If, on the other hand, the pursuer's conduct was reasonable, does not this point to the fact that a boar, like a dog, may in the ordinary case be driven away with safety? Now it is established law that in the case of a dog previous knowledge of a savage disposition must be traced to the owner.

In *Wilson v. Littlejohn* (January 17, 1882) Lord Fraser has decided a point of some importance in the law relating to bills. Under the 16th section of the "Mercantile Law Amendment Act" it is provided that the indorsee of a bill or note indorsed after the period of payment holds it subject to all objections or exceptions which might be pleaded against the indorser. In this case a promissory note had been transferred *without indorsation*. The Lord Ordinary however held that the above section did apply. He says, "The evil which the Legislature intended to remedy was one which could only be met by extending the construction of the statute so as to meet a case like the present. The object was to assimilate the law of the two countries upon this point, and according to the law of England, the same objection that could be stated to the

holder of a bill who took it when overdue from one who indorsed it, can be stated against a transferor by delivery." Whether this is a safe ground upon which to base the construction of a statute may be doubted, because we know that the Legislature intends to do much which it fails to accomplish.

Another decision has been given under the Presumption of Life Act in *Craig and Others* (January 20, 1882, First Division). A man had disappeared upwards of thirty years ago. Twenty-three years after his disappearance a succession opened to him. A petition by his next of kin for authority to make up title was refused upon the ground that under the Act he must be presumed to have died seven years after his disappearance, and consequently previous to the date of the opening of this succession. Thus the statute does not always operate in favour of the representatives of absentees. At common law the presumption would have been in favour of the lost man having survived the period of vesting.

PREVIOUS CONVICTIONS AS AGGRAVATIONS.

It is a trite maxim that the frequency of the transgression increases the punishment of the wrong-doer, a maxim broad enough to cover all kinds of criminal misconduct, but which our practice has, we venture to think, injuriously narrowed by rejecting evidence of previous transgressions, in the form of previous convictions, unless obtained for crimes bearing precisely the same *nomen juris* as those subsequently committed. The most glaring anomaly which long existed in our practice under this narrow rule was forcibly exposed from the Bench in a case of robbery tried before the High Court in 1852, in which previous conviction of theft was, for the first time, charged as an aggravation of the graver crime. Lord Cockburn, in giving his opinion on an objection to the competency of such an aggravation, said, "On principle, I would have thought that a previous conviction of theft was relevant as an aggravation to a charge of robbery. I would have been the more inclined to take this view, that it is impossible not to feel the absurdity of our existing practice. A man is convicted of theft. If he commits another simple theft, that previous conviction may be appealed to as an aggravation of his new offence. But if, instead of a simple theft, he commits a much worse, a more daring theft, a theft by violence to the person, then he is not to suffer by the previous conviction." But, because of previous inveterate practice, his Lordship concurred with his brother judges in sustaining the objection to the novel aggravation. This anomalous state of practice continued till 1868, when a remedy was obtained by the 31 and 32 Vict. c. 95, sec. 12 of which enacts that "it shall be

competent in any criminal letters or in any indictment before the High Court or Circuit Court of Justiciary charging any person with the crime of robbery, and in the course of the trial proceeding on such criminal letters or indictment as aforesaid, to prove a previous conviction of the person accused for the crime of theft as an aggravation of the said crime of robbery; and in like manner it shall be competent to libel and prove a previous conviction for the crime of robbery as an aggravation of the crime of theft." It will be observed that this enactment has no reference to Sheriff Court practice, so that a charge of theft in that Court cannot be aggravated by a previous conviction of robbery. The Sheriff has no jurisdiction to try robbery, though mere sentences of imprisonment, such as the Sheriff passes in ordinary cases, are now frequently pronounced by the Justiciary Court in cases of robbery, where the violence has been slight. It sometimes consequently happens that a case of theft against a prisoner who has had a sentence of imprisonment on a previous conviction of robbery, is sent for trial in the Sheriff Court, in which event the previous conviction cannot be made use of. The new enactment has, however, generally removed the anomaly in our former practice; and we humbly think there is room for a further extension of our rule, to admit the aggravation of previous conviction on the trial of various other cognate crimes.

The crime of stouthrieff formerly included all kinds of theft accomplished by means of violence to the person, and was used synonymously with robbery; but in modern practice this term has become the *vox signata* for forcible invasion of a person's dwelling-house and masterful theft therefrom, while robbery is held to apply to theft from the person accompanied by violence. The distinction between the two crimes is thus more shadowy than between robbery and theft. It has been usual to charge previous convictions of theft as aggravations in cases of stouthrieff, as well as to libel previous convictions of the latter crime as aggravations of theft, although repeatedly objected to by counsel for the panels. But at the Glasgow Spring Circuit in 1863 Lord Neaves expressed his decided opinion against the competency of charging such aggravations; and the previous convictions of theft in a case of stouthrieff then before him were withdrawn. This is the last-reported case in point, and his Lordship's decision stands alone against a long course of previous practice. The section of the Act of 1868 above quoted makes no mention of stouthrieff, but should the question of aggravating that crime by previous conviction of theft again arise, it is probable that the spirit of the provision, with a consideration of previous practice, will lead the Court to hold the law not unsettled by the above judgment.

Our subject becomes of considerable practical importance when we come to deal with cases of breach of trust and embezzlement, between which and the crime of theft the distinction is exceedingly

thin and unsubstantial, or, to use again the words of Lord Cockburn, "the most evanescent and slimmest known in our criminal law." When Baron Hume wrote his Commentaries many acts now held to be theft were treated as breach of trust and embezzlement; for example, the felonious appropriation, by a watchmaker, of watches given him to repair; or, by a carrier, of goods given him to deliver; or, by a passenger, of a pocket-book and money which he finds upon the highway, the owner's name being marked on the book; or, by a hackney coachman, of a parcel left by mistake in his coach. This extension of the law of theft has led to further anomalies in our practice in regard to previous convictions. Under our narrow rule, offenders guilty of the above acts, now recognised as theft, cannot be competently charged with previous convictions of similar acts committed by them when such fell under the *nomen juris* of breach of trust and embezzlement. Let us cite one case in point out of several in our experience. Before the present practice became fixed, a dressmaker in Dundee was convicted four times before the Sheriff and a jury, and suffered lengthy imprisonments, for numerous acts of what were held to be breach of trust and embezzlement, by feloniously appropriating materials given to her to be made into articles of dress. Before the Spring Circuit Court, Perth, 1863, she was convicted of numerous acts of *precisely the same nature*, but this time the *nomen juris* was *theft*; the previous convictions could not be relevantly charged against her, and their existence was unknown to the Court. By a happy transition of breach of trust and embezzlement into theft, the woman appeared before the Court as a first offender and was dealt with accordingly.

The *nomen juris* of breach of trust and embezzlement is now generally limited to the felonious appropriation of money by collectors of accounts, cashiers, and others intrusted with the possession and administration of their employers' funds, and who are not bound to deliver or produce the very notes or coins received by them, but whose obligation is simply to account for the amount thereof. The criminal appropriation of money in such circumstances is practically theft, with the element or aggravation of breach of trust; numerous cases have occurred, and are found in daily practice, of such offences committed by previously-convicted thieves; and the curious anomaly prevails, by reason of our narrow rule, that the previous convictions cannot be used as aggravations.

In dealing with the crime of falsehood, fraud, and wilful imposition, which runs almost imperceptibly into the cognate crime of theft, we find considerable fluctuation in practice, the two crimes being frequently charged alternatively, and sometimes cumulatively, on the same *species facti*. In a recent case (*Hardinge, etc.*, 4 Irvine, p. 347), charged alternatively as fraud, etc., or theft, the Lord Justice-Clerk held that though the facts proved amounted to swindling, they might also constitute the crime of

theft, and the panels were found guilty of theft accordingly. Falsehood, fraud, etc., is simply an indirect mode of committing theft, or theft by fraudulent means; but here again we have the anomaly that previous convictions obtained under the *nomen juris* of theft, which may, as in the case above referred to, have amounted to swindling, or falsehood, fraud, etc., are inadmissible as aggravations in a subsequent similar charge libelled under the *nomen* last mentioned.

In dealing with theft and reset, an intimate bond of connection between them is also apparent. Reset is an accessory crime, a proper sequel to theft, and in some sense a continuation thereof. On the evidence the case generally turns on the question of time, the presumption being in favour of theft or reset, according as the possession of the stolen property is shown to be *de recenti* or *ex intervallo*. From the necessities of the case the two crimes are often libelled alternatively on the same *species facti*, leaving it to the Court or jury to determine, on the evidence, which of them is established, unless the accused judiciously embraces the opportunity of pleading guilty to the minor alternative, thus getting quit of such previous convictions of theft as may be libelled against him. It seems impossible to doubt that, in such circumstances, the thief is sometimes punished as the resetter only: as matter of experience we have no doubt that this is so. But assume that the resetter has no connection with the theft, beyond his act of reset, we have the remarkable inconsistency, in actual practice, of prisoners who have served long periods of imprisonment or penal servitude for theft, escaping with a trifling sentence of a few months' imprisonment for reset. Many offenders, after a long career as thieves, become more cautious and merge into the character of resettlers, a calling more lucrative than stealing, and, from its latent character, more difficult of detection. It is a common saying that if there were no resettlers there would be fewer thieves; our maxim that the resetter is as bad as the thief is especially true if the resetter is a previously-convicted thief; and surely a criminal who is both a thief and resetter is a worse offender than he who pursues only one branch of crime—all substantial reasons, we think, why previous convictions of either crime should in subsequent convictions form a material element in the question of punishment.

Another prominent anomaly occurs in the crime of house-breaking with intent to steal, a crime which shows much daring on the part of the offender, and between which and the successful accomplishment of his intention there is no real difference in moral guilt. Here is a typical case: A. B. is convicted of theft, with the double aggravation of house-breaking and previous convictions, and is sentenced to seven years' penal servitude: in due time he is liberated on licence, but relapses into crime, forfeits his ticket of leave, and is sent back to fulfil his time. On his final liberation

he breaks into a house, but is caught before he secures his expected booty. Being put on trial for house-breaking with intent to steal, he is not charged with having been previously convicted of theft, and the fact of his being a returned convict is not brought before the Court, and cannot relevantly be so: the convictions are inapplicable for the technical reason that they are under a different *nomen juris*: the result is a short term of imprisonment instead of a long term of penal servitude. If A. B. had succeeded to the extent only of removing or merely displacing some article from its position there would have been such legal *amotio* as to constitute theft, and his previous convictions would then have been competent aggravations. Should his next house-breaking effort be successful to this extent, his last conviction of house-breaking with intent could not relevantly appear against him; but if some accident should again interpose to balk his purpose, then the last conviction would be unobjectionable in point of relevancy! A previous conviction of house-breaking with intent to steal will aggravate a subsequent act of the same kind, just as a previous conviction of theft is a legal aggravation of a subsequent act of theft, because each satisfies the legal test that it is under the same *nomen juris*. Our practice has unfortunately run so long in such a narrow groove that we cannot relevantly travel beyond the name, to which alone that importance is attached which should apply to substance only.

There is a close connection between the crimes of (1) falsehood, fraud, and wilful imposition; (2) uttering forged documents; and (3) uttering base coin, inasmuch as, substantially, all are indirect modes of feloniously acquiring the property of others, of which theft is the simple and direct method. In practice all these crimes are often committed by the same offender, who may also be a thief; and a prudent variation by him in his *modus acquirendi* serves wonderfully to lengthen his criminal career, which would be speedily abridged by confining his furtive operations to one unvaried method. Take the case of C. D. as an illustration. He starts early as a thief, and runs up various convictions before the Police and Sheriff Court. Then he turns swindler, commencing *de novo* in the Police Court, his previous convictions being ignored: next he becomes a smasher or utterer of base money, being treated in this character as a first offender. After numerous convictions of these various crimes he resumes thieving, but as his convictions under this head are by this time somewhat old, little weight is given to them in meting out his punishment. In course of time, however, he scores fresh convictions for theft, and ultimately finds himself in penal servitude. On his liberation from a convict prison he selects a new mode of action. Having surreptitiously got hold of a bank pass-book, he forges a bank order in name of the depositor, and having uttered the same at the bank, he obtains a substantial sum of money, which he appropriates. This is prac-

tically a theft of the money, his new crime being in reality the mere *modus* by which the act of theft is committed; but as the crime is not technically theft, and his convictions of theft could not therefore be libelled, he appears at the bar of the Sheriff Court again, this time as a first offender, and escapes with a short sentence of imprisonment. Supposing he had, in the course of uttering the forged order, made a false representation orally to the bank-teller, he would technically have been guilty of falsehood, fraud, and wilful imposition, and his previous convictions for that crime would have been competent aggravations; or supposing he had been so injudicious as to steal the bank-book,—which he had simply inspected,—then the previous convictions of theft would have come into play, even though he had been unable to make any profitable use of the book. He had simply, beyond his acts of forgery and uttering, made a theftuous use of the book, but that was not indictable.

Further cases might be cited in illustration of the position that our law is unreasonable in principle and inconsistent in practice in dealing with the aggravation of previous convictions, but enough has probably been said to prove this. The question might indeed be looked at in a broader view than has fallen within the scope of these illustrations. Why should not previous convictions of any crime in our law be relevant aggravations of any other crime, how remote soever in kind? If it is right to aggravate any specific crime by specific convictions of that crime, it is difficult to see why the offender should escape from the effects of his criminal habits when directed into other channels. A criminal whose versatility leads him to pursue various branches of crime, is a more dangerous offender than he who continues in the same unvarying path. If a really first offender is to have the benefit of his previous good character, why should not the habitual criminal have the disadvantage of his general bad character, as shown by convictions? In such a thorough change of practice as thus indicated we should only be following the example of our English neighbours, whose practice in this respect, we think, contrasts favourably with our own. We are aware, of course, that in England previous convictions are not proved or laid before the Court until the prisoner has been found guilty; and we are not here to discuss whether, in this particular, the English practice is preferable to our own, which has sometimes been complained of as inimical to the interests of the accused, and which generally forms a topic for declamation by prisoner's counsel. We may observe, however, that a lengthened experience has failed to show us an instance where a prisoner has suffered prejudices from his convictions being laid before the jury, who always lean to the side of the accused and, with the concurrence of the Court, give him the benefit of any reasonable doubt on the merits.

The simple form of an English indictment, without any major

proposition or reference to convictions, has doubtless facilitated or led to the practice there of submitting to the Court, after verdict, such information in the shape of previous convictions as may assist in justly fixing the punishment. Even were it competent with us to prove all kinds of convictions as aggravations under our present mode of libelling, some natural connection between the crime charged and the previous convictions would probably be observed: we would not, for example, expect to find rape aggravated by forgery, or wilful fire-raising by theft, or fraud, etc., by assault. But there would be no incongruity or objection in point of principle, in convictions for any of the crimes to which our illustrations have referred, viz. theft, stouthrieft, breach of trust and embezzlement, falsehood, fraud, and wilful imposition, reset of theft, house breaking with intent to steal, forgery and uttering false documents, being used as aggravations of any of the others. They are all intimately connected by the common tie of being offences against property—all crimes involving the essential element of dishonesty—all, or several of them, moreover, often committed by the same offenders. So far as the crimes of robbery and theft are concerned, the Act of 1868 has happily to a considerable extent removed the previously-existing anomaly, and thus opened the way for further amendment in a similar direction; and there should be no difficulty in carrying such a further measure of reform as would do much to redeem our practice from long-tolerated inconsistency.

NAMING THE PARAMOUR.

By the Roman law, and also by the earlier canon law, the marriage of adulterers was prohibited; but by a rescript of Innocent III. such marriages were legalized by the law of the Church. Prior to the Reformation the question does not seem to have arisen in Scotland, where, indeed, divorce *a vinculo* was unknown; but immediately after the legalization of divorce at the Reformation, the subject attracted the attention of the Church, which from the very first assumed an attitude of uncompromising opposition to the recognition of such unions. The General Assembly prohibited the clergy from uniting adulterers in marriage; the Privy Council declared this finding of the Church Court illegal. So the matter stood for thirty years subsequent to the Reformation, down to 1600, when the question was finally set at rest by an Act of the Scottish Parliament (1600, c. 29), which ordains "all mariages to be contractit heirefter be ony persones divorceit for thair awin cryme and fact of adulterie, frome thair lauchfull spouses, with the persones with quhome they ar declarit be sentence of the ordinar judge to have committit the said cryme and fact of adulterie to be in all

tyme cumming null and unlauchfull in tha selfis, and the succession to be gottin be sic unlauchfull cōiunctionis, to be unhabill to succede as airis to thair saidis parentis."

This Act is still in force. A legal marriage cannot be contracted in Scotland between parties who in a decree of divorce have been declared guilty of adultery with each other. The object of the law and the ground of the limitation are both readily intelligible. The law is meant to heighten in public estimation the sanctity of the marriage bond, and to discourage conjugal infidelity, by placing an obstacle in the way of the social rehabilitation of the offender, and by rendering it impossible that the commission of adultery should ever be the first step towards the contraction of a legitimate union. On the other hand, it is obvious that such a bar to marriage must be of a very strict and definite character. The capacity of persons to contract marriage must not be left to depend upon the result of a general inquiry into their previous conduct; questions of succession, status, and legitimacy, which may arise forty or fifty years after the contraction of a union, cannot be made dependent upon the result of a proof at large as to whether or not the parties to that union had, previous to its contraction, been guilty of adultery with each other; *the adulterers must be named in a duly-recorded decree of divorce.*

Such is the law on the matter in question, and such the grounds upon which it rests; and we are by no means disposed to call in question either the justice or the expediency of the enactment. Unfortunately, however, all do not seem to be of this opinion, for not only has the repeal of the Act of 1600 been advocated, but its provisions are, we believe, generally evaded. In 1860 a committee of the Faculty of Advocates, appointed to report upon the "Conjugal Rights Bill," recommended that a clause should be introduced into that Bill repealing the Act of 1600. Upon this recommendation, however, the Faculty declined to act, fearing that the proposal to insert such a clause might endanger the passing of the Bill. No formal proposal to change the law has, we believe, been made since that date; but this is not because the law is generally approved, but because it is so easily evaded. As we have above indicated, adultery followed by divorce is no impediment to subsequent marriage between the guilty parties unless the adulterers have been named as such in a decree of divorce; and the Lords Ordinary, in granting divorce, generally refrain from naming the paramour in their decrees. On one occasion, we recollect, a distinguished counsel, since Lord Advocate, and now on the Bench, appeared for the co-respondent in an action of divorce. The fact of adultery was not disputed by the co-respondent, and his counsel took no part in the proceedings until at the close the Lord Ordinary said, "Grant decree," when the learned gentleman at once rose and moved his Lordship not to name the co-respondent in the "Your object is quite clear; I will see to it," was the

reply, and the co-respondent was not named in the decree. In a more recent case the fact that the name of the paramour is generally of purpose omitted in the decree was adverted to in the First Division without provoking any unfavourable comment on the part of their Lordships. Now, apart altogether from any question as to the justice or humanity of the law which prohibits the marriage of adulterers, we would, with submission, maintain that, in refraining from mentioning the name of the paramour in a decree of divorce, in order to enable the parties to marry, the Lords Ordinary who pronounce such decrees are exercising a discretion with which it was never intended that they should be intrusted. We have already indicated the ground upon which the Legislature limited the prohibition to the case where the adulterers are named as such in the decree. It was not the intention of the Legislature to leave the capacity of a divorced person to contract marriage with the paramour dependent upon the good-nature of the Lord Ordinary who tried the case, and still less to make such Lord Ordinary a judge of the policy of the law. The object of the law was to place a bar in the way of the marriage of parties who had been proved to have committed adultery with each other, and the framers of the law, in introducing the provision that the paramour must be named in the decree, assumed that (except in very special circumstances) where the paramour was clearly identified, the judge in pronouncing decree of divorce would name him in his decree. In this view, the effect of being named in the decree, upon the future capacity of the parties to marry, is, in the general case, a wholly inadmissible consideration for the Court. The Lord Ordinary who gives effect to such a consideration has become a judge, not of the law, but of the policy of the law.

That the law which prohibits the marriage of adulterers should not be enforced or evaded at the mere discretion of the Lord Ordinary who tries the case is, we think, a proposition which none will venture to dispute, but we enter upon much more debatable ground when we proceed to consider the wisdom or expediency of the law itself. The general opinion, in legal circles at all events, seems to be against the maintenance of the law. We have already adverted to the fact that the Court is generally unwilling to render the law effectual, and that twenty years ago the Faculty of Advocates proposed to abolish it; and the most recent Scottish authority upon consistorial law argues strenuously against it. (See an elaborate note in "*Fraser on Husband and Wife*," vol. i. p. 147.) Now the argument employed by the critics of the present law seems simply to come to this, that to allow the paramours to marry after divorce is the best that can be made of a bad business. It is a pity that the wife has broken her marriage vows, a pity that her injured husband has been obliged to seek against her the remedy of divorce, but the evil cannot now be undone, and it is surely humane to allow the poor woman's seducer to make to her the only reparation in his

power. Better surely that the poor disgraced woman should be permitted in some measure to rehabilitate her character by contracting a legitimate union than that she should be condemned to drag out the sad remainder of her days an outcast from human society. Now there is undoubtedly some force in this reasoning, yet we believe that it is in truth based upon an entirely one-sided view of the question. We frankly concede that if the sole matter to be had in view be the future happiness of the divorced spouse, then certainly the law is a most harsh and unjust one. But other interests have to be considered, and it was in other interests that the law was framed. The law was made, not in the interest of spouses who have been divorced, but in the interest of spouses who are tempted to wander in the slippery paths that may lead to a divorce. All penal law (and though not a criminal law, the enactment which prohibits the marriage of adulterers is a penal law) is preventive, not curative, and its ends are practical, not speculative. It is true indeed that Kant has insisted that, though the world were on the point of dissolution, the last murderer should be put to death; that Hegel has fulminated against any utilitarian theory of punishment, and insisted that justice is "an end unto its own self;" and that Roeder has taught that "the criminal has a right to punishment, just as the starving and impotent have to soup;" but no such refinements influence the mind of the lawmaker, who regards the question from a much more practical and matter-of-fact point of view. Penal laws are passed and enforced, not to vindicate justice as an ideal end in itself, not even for the benefit of the criminal, but solely for the protection of the community. The judge who sends a man away for ten years into penal servitude may take advantage of the occasion to point out to the unhappy prisoner and to the public assembled in the Court the beauty and majesty of justice, and the prison authorities who lock the man up may supply him with a chaplain and a schoolmaster, and do their best to reform him, but he is shut up, not for the sake of "justice as an end in itself," or even to afford time and opportunity for his own reformation, but, as the indictment on which he is convicted frankly puts it, in order "to deter others from committing the like crimes in all time coming." Were it otherwise, were punishments inflicted either to vindicate abstract justice or for the good of the offender, there is no reason why the law should not punish the offender, whose sins are of a character directly injurious only to himself, and only indirectly hurtful to the community. The habitual drunkard, or, for that matter, the habitual liar, stands in as much need of reformation, and sins as grievously against abstract justice, as does the habitual thief; and is there any ground for holding that abstract justice is better vindicated by the punishment of the thief than it would be by the punishment of the drunkard or the liar, or any good reason to believe that seven years of confinement, with the daily attendance of chaplain and schoolmaster, would

prove less efficacious in promoting the reform of the drunkard or of the liar than that of the thief?

Now to apply this to the matter in hand. The law which prohibits the marriage of adulterers is meant, not to vindicate justice in the abstract, or to reform the offender, but "to deter others from the like offence." Just as the law holds that if theft means confinement for some months or years in a penitentiary, and if murder entails a shameful death, people are likely to think twice before committing either of these offences, so the law concludes that if adultery followed by divorce means permanent degradation and exclusion from society, adultery is likely to be a comparatively rare offence.

We confess that we fail to find any peculiar harshness or inhumanity in the present law. That guilt entails punishment, that sorrow and suffering follow sin, that "the way of transgressors is hard," is a law older than the Pyramids, and a law whose inherent righteousness has never been called in question. It is sad no doubt that an erring woman should for the remainder of her life be subject to the terrible punishment of public scorn and disgrace, but it is no less sad that the youth who in an hour of desperation has forged his master's name to a cheque, should be doomed to drag out the weary years at the degrading toil and in the loathsome company of the convict gang. Better, they tell us, make the best of it and allow the woman to marry; then better, too, make the best of it and let the young man go. But we are further told that it is hard upon the children of a union between adulterers that they should have attached to them throughout life the indelible stain of bastardy. Undoubtedly this is hard, but the stain of bastardy is not more terrible surely than the stain of felony; the child of an illicit union is not more unhappily situated than the child of the man who died upon the scaffold. If we allow adulterers to marry for the sake of their children, we must be consistent, and on similar grounds allow murderers to live.

There can, we fear, be little doubt that in this country the marriage bond is held less sacred than was the case a generation ago. Conjugal infidelity is not so emphatically condemned by public opinion as formerly, especially amongst the upper classes. Things have not indeed come to such a pass that conjugal infidelity can be altogether overlooked, or talked of, like absence from church, as a thing reprehensible though not disgraceful; but an impression seems to be gaining ground that the character of a divorced person is a character capable of rehabilitation, that, not at first certainly, but by-and-by, little by little, a divorced person, especially if married again, may be received back into society. Now it is because we believe it to be in the best interests of public morality that the character of a divorced person should be a character incapable of rehabilitation, and that the divorced person should be permanently excluded from society, that we are opposed to any

alteration or evasion of the present law, and we believe that any proposal to change the existing law would have the unfortunate result of confirming public opinion in the misguided impression to which we have referred. Effect the proposed change, repeal the Act of 1600, and the matter will then stand thus. To the spouse who is tired of a subsisting marriage, and desires to unite with another, the law can hold out no hope of his or her being enabled to contract a legal union with the object of affection so long as such spouse shall remain in the paths of virtue; the first step towards the contraction of a legitimate union must be a departure from that path. To vice the law can hold out hope, to virtue none; in other words, the law sets a premium upon adultery. Such is at present the law of England, and to this state of the law are, we believe, to be attributed many of the aristocratic scandals which for the last few years have so often furnished food for sensation. Only by the exercise of self-sacrifice on the part of an injured spouse in refusing a divorce can the union of adulterers be prevented. In many cases, we believe, such self-sacrifice is imperatively called for by the existing state of the law in England; but there is no good reason why the law should make the life of the injured, no less than that of the injurer, a burden. We read the following the other day in a "society journal:" "Mr. X's friends urge him to take the only revenge in his power, by refusing a divorce." Now if, as is contended, the marriage of adulterers be humane, just, and expedient, why should Mr. X. even have it in his power, by "refusing a divorce," to defeat such a union? But if, on the other hand, as we have contended, the legalization of the marriage of adulterers is inexpedient in the interests of public morality, why should not the law provide some remedy which would render it unnecessary for Mr. X., in order to defeat such a marriage, to remain bound to an adulteress, and obliged to support her for the remainder of his life, and leave her one-third of his property at death? As the law at present stands in England, an injured spouse has no alternative but either to consent to remain united throughout life to an adulterous consort, or else to see that adulterous consort triumphantly attain the object for which the cruel offence was committed. Public opinion has even debarred an injured husband of the melancholy satisfaction of the duel, and we venture to think that this is to be regretted. It is no doubt rank heresy to say so, but we believe that it would have been for the best interests of morality in this country had duelling maintained its place as the remedy for offences against female honour. We may depend upon it there would be fewer aristocratic scandals, fewer sensational elopements, did public opinion permit and require the injured husband to meet, pistol to pistol, the destroyer of his home. No doubt it would be very hard upon an injured husband that in addition to losing his wife he should also have to incur the risk of losing his life, but were there a code

of honour which required him to incur this risk, such a code would exist, not for the benefit of husbands who had been, but for the protection of husbands who might be injured. Like the law we have been discussing, it would be preventive, not curative. No such code of honour, however, now exists or is likely to exist in this country, and therefore it is, we believe, of the greater importance that the existing law should be maintained, and that the Court should take care to make that law operative by "naming the paramour."

Correspondence.

(To the Editor of the "Journal of Jurisprudence.")

PROSECUTIONS FOR ROAD OFFENCES.

SIR,—In your issue for last month your correspondent "Nestor" draws the conclusion that all prosecutions in respect of statutory offences where the penalty does not exceed £12, including, in particular, offences under the Road Acts, may still be brought in the Sheriff's Small Debt Court. But, so far at least as regards these road offences, the following observations occur:—

(1) Along with the exception to what immediately precedes in the end of sec. 27 of the Summary Procedure Act, 1864 (awkwardly expressed, it may be, as commencing with the words "*save and except*"), and in support of the adverse opinion indicated by the author of the recent treatise on "Review in Criminal Cases," there falls to be read sec. 32 of the Act now referred to, providing that the proceedings may be, alternatively, in certain forms, without mention being made of the forms in the Small Debt Act; and, coupled with this last-mentioned section, there falls further to be read the definition, applying prospectively as well as retrospectively, of the words "Act of Parliament" or "Act," as given in sec. 2 of the same Act. (2) Secs. 110 and 111 of the General Turnpike Act of William IV. contain special provisions for the forms of proceedings for the recovery of penalties. At the same time, by sec. 116, it was expressly declared that nothing in the Act should render Small Debt actions before the Sheriff incompetent. Under sec. 122 of the Roads and Bridges Act, 1878, however, all these sections stand repealed in counties where the last General Road Act has been adopted. (3) By sec. 124 of the Act of 1878 it was thereupon enacted that "all penalties under this Act, or the enactments incorporated herewith, or continued in force hereby, *may be recovered*, together with the expenses of process, at the instance of the procurator-fiscal, or of the clerk of the trustees, or of the clerk of the Burgh Local Authority, as the case may be, *upon the testi-*

mony of one or more credible witnesses, before the Sheriff or any Justice of the Peace of the county, or Magistrate of the burgh, as the case may be, *in which the same shall have been incurred, under the provisions of the Summary Procedure Act, 1864*; and all the jurisdictions, powers, and authorities necessary for this purpose are hereby conferred on Sheriffs and Justices of the Peace and Magistrates of burghs; *and their decision shall be final, save only that the provisions of the Summary Prosecution Appeals (Scotland) Act, 1875, shall apply to the same.*" Now it is humbly conceived that in proceedings for the recovery of such penalties, the provisions in this clause for the *minimum* amount of sufficient evidence for the regulation of jurisdiction by reference to the *locus delicti*, irrespective of domicile, and for the finality of the decision, saving only a right of review on questions of law, were meant to be of *universal* application; and if so, the inference seems unavoidable, that the other provisions in the clause are to be similarly construed. Were it otherwise, there would be one set of rules for matters of paramount importance in the Summary Criminal Court, and another for the same matters in the Small Debt Civil Court. Moreover, the change from the one set of rules to the other would be left entirely at the option of the prosecutor. (4) By the last clause of sec. 124 of the Act of 1878 it was enacted that "every person found liable in any penalty recoverable summarily under this Act, shall, failing payment thereof and expenses, *immediately or within a specified time*, as the case may be, be liable to be imprisoned for a term not exceeding sixty days; and the conviction and warrant may be in the form No. 3 of schedule K of the Summary Procedure Act, 1864." But were the Small Debt Courts still open, all discretion with respect to fixing the time for payment of the penalty, in cases brought before these Courts, would be at an end; for, be the *terminus a quo* the date of the decree or the date of a charge of payment thereon, under sec. 13 of the Small Debt Act, the period of grace allowed the defender is in every instance ten days.

Having in view these various considerations, I feel constrained, at any rate as regards prosecutions for road offences, to draw, with all deference, but very decidedly, a conclusion opposed to that which has been arrived at by your previous correspondent. As I understand the matter, it is always a question of construction, having reference to the objects of a statute and also to the context, whether the word "may" in the Act is or is not to be read as "must." That this should be so often left to open question is one of the curiosities of legislation.

One word as to the expenses of these summary criminal prosecutions. All proceedings which may result in interference with the personal liberty of the subject resemble sharp-edged tools in this, that they require care in the handling; and surely in the general or average case it demands at least as much care to fill

up a form of complaint under the Summary Procedure Act of 1864 as it does to fill up the form of a petition under the Sheriff Court Act of 1876, and it would not be at variance with justice if the fees were found to be regulated accordingly. Into the Summary Jurisdiction Act of 1881 Parliament has seen fit to introduce a completely new table of fees; but the utterly unremunerative nature of these fees has been causing practitioners to inquire if the table supplies the rule as in a question with employers, and the view, understood to be acted upon in some quarters, is that it does not. On this point it would be very desirable to have the opinion of some of your other readers.—I am, etc.

A SOLICITOR.

NOTARIES PUBLIC.

SIR,—Of late, from time to time, letters have appeared in your pages making reference to encroachments by notaries on the province of the ordinary procurators. Take the following case: A person in want of advice on a point of law quite foreign to the conveyancing department, sees a notary, designing himself, in newspaper advertisements, as a solicitor. He takes the designation to be true, applies to the notary, is ill advised, and suffers loss in consequence. Will it found or fortify a claim of damages against the notary that the latter has been advertising under false colours? And, as the law stands at present, can or can not the notary be stopped from holding out such colours?—I am, etc.

A READER.

Obituary.

THE following interesting notice of a career which at one time promised to be a brilliant one appears in the *Daily News*:—

EDWIN JAMES.—The death of Mr. Edwin James, which occurred on the 5th ult., carries the mind back a good many years to the details of a sad and striking story. The records of the English Bar contain no more sudden, and we fear we must add no more ignominious, fall than that of the once famous lawyer who has just passed away. It is so long since the catastrophe occurred, and the world is so busy with more important matters, that the case of *Scully v. Ingram*, and the scandals connected with it, have become, like Hamlet's proverb, something musty. No good end could be served by recalling the minute incidents of transactions neither important in themselves nor creditable to those concerned. The interest of Mr. James's career does not lie in the particular transgressions which led to his compulsory retirement from the Bar, but in the contrast between his rapid success and his sudden descent, in the social significance of his fate, and in the narrow line which separated him from complete and final triumph. Denunciation would be doubly out of place, both

because Mr. James has but just departed from the community in which he once held so distinguished a position, and because professional justice long since selected him, by the rough and arbitrary method which she is forced to use, as a victim, perhaps no worse than others, to be offered at the shrine of forensic honour and respectability. But the moral of a life which in its public aspects has long since been closed may be read without offence even by an open grave. Though it is nearly fifty years since Edwin James was called to the Bar, the public recollection of him probably dates from a little after the middle of the present century. It was then that he was at the height of his fame. In 1852 he took silk, and in 1859 he became member for the borough of Marylebone. Two or three years afterwards he was an outcast from his profession, and a refugee from his country. The son of a Secondary, which is the title of one of the numerous offices attached to the Corporation of London, it is believed that Mr. James had been on the stage before he was called to the Bar by the Benchers of the Inner Temple in 1836. Whether that be so or not, it is certain that he acquired in some way the dramatic use of voice and gesture which are supposed to impress a jury, and which certainly make a witness uncomfortable. The kind of practice which he obtained did not require much knowledge of law. As the concrete is generally preferable to the abstract for purposes of illustration, we may say, without attempting an elaborate definition, that it was the sort of practice in which Serjeant Ballantine has achieved reputation. Mr. James was retained rather to inflame the passions of a jury than to convince the reason of a judge.

No one who has any practical acquaintance with the administration of the law will despise the qualities which an advocate of this stamp requires. Great quickness of intelligence, considerable powers of speech, and a knowledge of the weaker elements of human nature are considerable gifts, and all these Mr. Edwin James certainly possessed. Though he was employed in the case of the fugitive slave Anderson, the most important trial in which Mr. James took part was that of Simon Bernard for wilful murder. Dr. Bernard was formally indicted for having caused the death of one Nicholas Batty; but the real gist of the offence was that he had conspired with Orsini and others to kill the French Emperor by means of a bomb. The case was heard in April 1858 at the Central Criminal Court before four judges, of whom Lord Campbell was the chief. The late Sir Fitzroy Kelly prosecuted, and Mr. James led for the defence. It was mainly owing to his vigorous and impassioned address that the jury returned a verdict of acquittal, for the evidence was very strong. The only chance for the prisoner was to pass away from the facts, denounce a foreign despot, and appeal to the English love of freedom. Mr. James succeeded by exciting sentiments which were honourable enough in themselves, and which were but a slight distortion of the strong feeling displayed in Parliament against Lord Palmerston's Conspiracy to Murder Bill. Lord Campbell, who summed up for a conviction, naturally did not like the result of the trial. "All Europe," he says in his "Autobiography," with characteristically candid egoism—"All Europe looked on with intense curiosity, and all the world was astonished at hearing a verdict of not guilty pronounced." An odd question decided in the course of the proceedings illustrates Mr. James's style of cross-examina-

tion. "Did you go as a spy?" he asked a sergeant of police who had attended a revolutionary meeting, and the Court solemnly decided that a witness could not be asked to draw an inference, though it was from his own conduct, but simply to state facts. The question was very much in the vein of Mr. Stryver, the "fellow of delicacy" in the "Tale of Two Cities," and was perhaps suggested by Erskine's form of addressing an informer as "Good Mr. Spy," in which case also the judge interposed with the suggestion that that was not examination, but comment, which might afterwards be properly laid before the jury. A year after this trial Mr. James became a Queen's Counsel, and was elected member for Marylebone. He was now at the height of his fame, but it was remarked as curious at the time that the Benchers of the Inner Temple would not, as is the ordinary custom, admit him as a colleague. Such an omission, however, did not, as other instances sufficiently show, necessarily imply any reflection upon the moral character of the Queen's Counsel thus passed over.

Soon afterwards the crash came. There were unpleasant rumours about pecuniary transactions between Mr. James and a young nobleman, but they were hushed up for a time. Suddenly in July 1862 appeared a notice in the *Gazette* that Mr. James's name had been removed from the list of Queen's Counsel. He withdrew from his clubs, and he was disbarred by the Benchers of his Inn. The discipline of the Bar is strict and secret, but it became known before long that in a case where Mr. James was counsel for the plaintiff he was accused of taking money from the defendant. Mr. James went to America, and for some years this country saw him no more. Great was the excitement in legal and Parliamentary circles, and it increased as the details of the story gradually transpired. The sums which were authoritatively mentioned were extraordinarily large, and yet Mr. James had not been known as a man of inordinately expensive habits. It was like the case of Causidicus, described in one of Mr. Thackeray's "Roundabout Papers." "All day" Causidicus "was at work for his clients; at night he was occupied in the Public Council. He neither had wife nor children. The rewards which he received for his orations were enough to maintain twenty rhetoricians. Night after night I have seen him eating his frugal meal, consisting but of a fish, a small portion of mutton, and a small measure of Iberian or Trinacrian wine largely diluted with the sparkling waters of Rhenish Gaul. And this was all he had; and this man earned and paid away talents upon talents, and fled owing who knows how many more!" Counsel are subject for professional misconduct only to the domestic form of their Bench. No action lies against them, just as they themselves cannot sue for their fees. The instances in which this power is exercised are rare. The late Dr. Kenealy, and a barrister whose name it would be cruel to mention, but who stole a book from the library of his Inn, have been almost the only victims in this generation. There is an appeal from the Benchers to the Judges, but it was eleven years before Mr. James resorted to this remedy. He became a member of the Bar in New York, and wrote reminiscences of the English profession for a sporting paper. He volunteered an opinion on the case of the Trent, which was not favourable to his native country. He came back in 1873, and sought to resume his practice. But the Judges rejected his appeal,

and he set up for himself as a "jurisconsult." He had an office in Bond Street, and gave cheap advice. Lately he fell into difficulties, and it is said that a subscription was about to be raised for him at the time of his death. It was a strange, eventful history. Mr. James's irregularities seemed so unnecessary, and the risk which he ran was so enormous. His professional income was popularly supposed to be £15,000 a year, and, applying the ordinary canon, may be fairly estimated at half that sum. His reputation, in its way, was great. He consorted with the men of light and leading in the law, the late Sir Alexander Cockburn being among his intimate friends. English lawyers are not required to be Puritans, or to practise the austerer virtues. Asceticism is not demanded of them, nor is any inquisition made into their speculative opinions or social habits. Mr. Edwin James was, however, not satisfied with the very considerable latitude allowed him. He forced his compeers to sit in judgment upon him, and he has left a melancholy example of weakness which no pleading could justify, and for which no talents could compensate.

The Month.

Report of the Committee of the Faculty of Advocates on the "Inferior Courts Judgments Extension Bill, 1882."—This Bill deserves the careful attention of Scotch lawyers and Scotch members of Parliament. It may be useful in a few cases, but unless its application is carefully limited, it is certain to become in a number of cases a cause of great annoyance, expense, and hardship to persons resident in Scotland.

The cases in which this Bill, if passed, may be useful are limited in number. Local and Inferior Courts, whether in England, Scotland, or Ireland, ought to have and exercise no jurisdiction except over persons resident within their own territory, and the cases must, it is thought, be comparatively few where a person resident in a county of any one of these countries where a suit has been instituted against him, leaves it with his whole effects before the judgment pronounced in such suit can be executed against him. Such cases, however, do occur, especially in the border districts of England and Scotland, and to meet these the provisions of the Act may be found useful.

It is, however, well known in Scotland, that of late years not only have the Supreme Courts of England and Ireland, in virtue of their rules of procedure, been assuming jurisdiction over Scotch defendants, but even the County Courts of England have commenced to issue orders for service in Scotland, and to summon Scotch defendants before them to answer at the instance of English plaintiffs resident in the county of the summoning court. Very recently a Glasgow merchant, having no place of business in England, was summoned to the County Court at Walsall, in

Staffordshire, for an alleged debt of £20, his witnesses being all resident in Glasgow, and a similar case occurred with regard to a Glasgow firm of merchants who were summoned to the County Court of Lancashire, at Manchester, for an alleged debt of £46.

This practice is indeed wholly indefensible. It is absurd that English Local Courts, intended to have a purely territorial jurisdiction limited to their own district, should be permitted to summon before them persons domiciled in Scotland, which in legal matters is practically a foreign country; but hitherto, although the exercise of assumed jurisdiction by the Supreme Courts of England over Scotchmen, and their orders of service upon Scotch defendants, have been felt to be almost intolerable grievances, the same malpractices on the part of the English County Courts have not hitherto been so numerous nor attended with so much hardship, for without considerable difficulty it is at present impossible for the English County Courts to execute their judgments against Scotchmen who have no property or effects in England.

Should this Bill, however, be passed into law in its present form, the difficulty will be removed, and in that case it is certain that there will be a great increase in the practice of issuing writs against domiciled Scotchmen on the part of the English County Courts, and that Scotchmen will be frequently summoned to these Courts in connection with petty debts when there is a dispute as to liability between them and Englishmen. Further, it will thereafter be impossible for Scotchmen to invoke the aid of their own Courts in resisting the judgments illegally pronounced by English local judges. This has been decided to be the effect of the similar Act of 1868 (31 and 32 Victoria, cap. 54) with regard to the Supreme Courts of England and Ireland in the case of *Wotherspoon v. Conolly* (10th February 1871, 9 Macph. 510).

The Committee are accordingly of opinion that it is imperatively necessary, with a view to protect the interests of Scotchmen, that a clause should be inserted in the Bill before it becomes law, by which it shall be secured that the Act shall not apply to any judgment pronounced by any Inferior Court in England against any person or persons domiciled in Scotland or Ireland at the time of the issuing of the summons or other initial writ in the action or other proceeding, in which such judgment shall have been pronounced; nor to judgments pronounced in any Inferior Court in Scotland against any person or persons domiciled at such time in England or Ireland; nor to judgments pronounced in any Inferior Court in Ireland against any person or persons domiciled at such time in England or Scotland.

Unless a clause to this effect is inserted in the Bill, every effort ought to be made, especially in the interests of the people of Scotland, to throw this Bill out altogether. With such a clause as is above suggested, the Bill may prove useful in the class of cases to which alone it ought to apply, namely, where persons

change their residence, and remove themselves and their effects from one country to another in the hope of evading the execution of decrees of local Courts pronounced against them in the place of their former residence.

Act of Sederunt regulating the Proceedings in Liquidations in the Sheriff Courts of Scotland, under the Building Societies Act, 1874.—Whereas by “The Building Societies Act, 1874,” 37 and 38 Vict. c. 42, sec. 32, sub-sec. 4, it is enacted that a society under the said Act may terminate or be dissolved “by winding up either voluntary under the supervision of the Court, or by the Court, if the Court shall so order, on the petition of any member authorized by three-fourths of the members present at a general meeting of the society specially called for the purpose to present the same on behalf of the society, or on the petition of any judgment creditor for not less than £50, but not otherwise;” and that “general orders for regulating the proceedings of the Court under this section may be from time to time made by the authority for the time being empowered to make general orders for the Court:”

And whereas, by sec. 4 of the said statute, it is enacted that the Court in this Act means—

“In England the County Court of the district in which the chief office or place of meeting for the business of the society is situate; in Scotland the Sheriff’s Court of the county in which such office or place of meeting is situate:”

The Lords enact and ordain as follows:—

1. All applications presented to the Court for the winding up of a society registered under the said Act, either voluntarily under the supervision of the Sheriff Court, or by the Court, shall be by petition, in form as nearly as may be of petitions under the Act 39 and 40 Vict. c. 70 (Sheriff Court Act, 1876), and the Court shall order service and advertisement thereof in the *Edinburgh Gazette*, and such further advertisement, if any, as the Court may consider necessary, and shall appoint the said petition to be heard on such early day as may be suitable.

2. The said petition shall be printed, and every shareholder and creditor of the company shall be entitled to receive from the solicitor of the petitioner a copy thereof on demand at his office.

3. The Court on the day appointed may hear the petitioner’s proof in support of the petition, and may also hear any parties interested in support thereof or in opposition thereto, and also any application which may follow thereon in the course of the winding up, either in open Court or in chambers, and may order such answers as may be deemed necessary; and may adjourn the hearing; and after such inquiry, by proof or otherwise, as may be deemed necessary, the Court may order the society to be wound up, or may dismiss the petition, or may make such other order as may be just.

4. The Court may, as to all matters relating to the winding up, have regard to the wishes of the creditors or members, as proved by sufficient evidence; and may direct meetings of the creditors or members to be summoned, held, and conducted in such manner as may be directed, for the purpose of ascertaining their wishes, and may appoint a person to act as chairman of any such meeting, and to report the result of such meeting to the Court. In the case of creditors regard is to be had to the value of the debt due to each creditor; and in the case of members, to the number of votes conferred on each member by the regulations of the society, or failing such regulations, to the number of shares held by each member.

5. For the purpose of winding up a society, a liquidator shall be appointed. The shareholders may nominate a liquidator at any meeting held by them, and called in terms of the 32nd section of the statute 37 and 38 Vict. c. 42, for the purpose of resolving to wind up the society under supervision of the Court, and of presenting a petition to the Court to that effect; and the Court shall confirm the nomination so made, unless sufficient cause to the contrary be shown. If the Court do not confirm the nomination, or if no such nomination has been made before the presenting of the petition, the Court shall, at the hearing of the said petition, or at any subsequent time, nominate a liquidator, either provisionally or otherwise. In the case of winding up by the Court, the liquidator shall be nominated by the Court. The Court may also determine whether any and what security shall be given by the liquidator; and every appointment of a liquidator shall be advertised in such manner as the Court may appoint.

6. Any liquidator may resign; or may be removed by the Court on due cause shown; and any vacancy in the office of a liquidator shall be filled up by the Court. There shall be paid to the liquidator such salary or remuneration by way of percentage or otherwise as the Court may direct.

7. When in course of winding up the society, it shall be necessary to carry on the business thereof for a time, or to make up titles to heritable property, or to compromise claims with contributors, these powers shall only be exercised with the sanction of the Court, obtained upon a note presented to the Court setting forth the grounds upon which the powers are asked for. The Court may, on the presentation of such note, order such intimation thereof as shall be deemed suitable and expedient in the circumstances. And further, it shall be competent to the liquidator to apply to the Court for instruction and direction in regard to any matter wherein, in his judgment, such instruction and direction are necessary.

8. The liquidator shall have power to appoint a law agent to assist him in the performance of his duties, and also with sanction of the Court to appoint a factor for taking charge of or managing any of the properties of the society.

9. Where a society is being wound up voluntarily under the supervision of the Court, the liquidator may from time to time during the continuance of such winding up call general meetings of the members of the society; and in the event of the winding up continuing for more than one year the liquidator shall call a general meeting of the members at the end of the first year, and of each succeeding year from the commencement of the winding up, or as soon thereafter as may be convenient, and shall lay before such meeting an account showing his acts and dealings, and the manner in which the winding up has been conducted during the preceding year.

10. The liquidator shall, as soon as may be after an order is made for winding up a society, make up and lodge in process a state showing—

(1) The liabilities and assets of the society in detail.

(2) The number of members, and the amounts standing to their credit in the books of the society.

(3) The liabilities of members of the society in terms of sections 13 and 14 of the Building Societies Act and of the rules of the society.

(4) The claims of depositors and other creditors, and the provision to be made for their payment.

(5) The sums to be repaid to the members, if any, after payment of the debts due by the society.

And such state may be objected to by any person having interest, and may be amended from time to time. And the Court may, after such notice or advertisement as may be thought proper, and after hearing any party or parties, sanction and approve of such state, or disapprove thereof, and if the same be sanctioned and approved of, the Court may authorize the funds to be distributed in terms of such state; and thereafter, on being satisfied that payment has been made to the creditors of the society and depositors so far as possible, and to the members of the society in terms of the said state, or when any sum or sums payable to any member or members of the society have not been claimed, that such consignment thereof has been made by the liquidator as the Court may direct, the Court shall declare the winding up of the said society to be at an end, and the society dissolved, discharge the liquidator of his whole actings and intromissions, and appoint his bond of caution, if any, to be delivered up.

11. The accounts of the liquidator shall be audited annually. The audit shall be made by such person as the Court may select, whether he be an auditor of Court or not, and the auditor shall report to the Court the audit so made. If it shall appear to the auditor that any payment by the liquidator should be disallowed, or that any charge has been incurred, as against the estate, which was unnecessary, or that any sum ought to have

been, but is not brought into account, he shall, in his report, bring the same under the notice of the Court, setting forth the grounds of his opinion, and the Court shall pronounce judgment upon the matter so reported upon as may seem just.

12. The Court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the estate of the society of the costs, charges, and expenses incurred in winding up the society in such order of priority as may be considered just.

13. The liquidator shall lodge all money received by him on account of the society in one of the banks in Scotland established by Act of Parliament or Royal Charter, in a separate account or on deposit, in his name as such liquidator, within seven days after the receipt thereof, unless the Court has otherwise directed. If the liquidator shall keep in his hands more than £50 of money belonging to the society for more than seven days he shall be charged in his account with a sum at the rate of 20 per cent. per annum on the excess of the said sum of £50 for such time as it shall be in his hands beyond the said seven days, and the Court may, in respect of any such retention, disallow the salary or remuneration of such liquidator, or may remove him from his office.

14. In every case where the Court shall order service, such service may be made by registered letter if the Court authorize it.

And the Lords appoint this Act to be inserted in the Books of Sederunt, and to be published in common form.

JOHN INGLIS, *I.P.D.*

EDINBURGH, *March 17, 1882.*

Proposed Legislation on Bills of Exchange and Promissory Notes.

—“A Bill for an Act to consolidate and codify the laws relating to Bills of Exchange and Promissory Notes” was ordered to be printed on 15th February 1882. The Bill is indorsed by no fewer than five English members. It extends to 41 folio pages. It codifies not only British Acts of Parliament, but enacts most of the points on the law of bills decided in the Courts of England, the decisions being noted in the margin, a most unusual, but certainly a most useful procedure. It is thus a most comprehensive and exhaustive attempt at codification. It commences with “the forms and interpretation of bills and promissory notes,” it proceeds with “the capacity and authority of the parties,” “the consideration for a bill,” “its negotiation,” “the general duties of the holder,” liabilities of parties,” “discharge of bills,” “acceptance and payment for honour,” “principal and surety,” “lost instruments,” “bills in a set,” “conflict of laws,” “cheques on a banker,” “crossed cheques,” “promissory notes,” “supplementary instructions.” Forms are given in schedules of notices, and, finally, eighteen British Acts of Parliament are wholly or partially repealed! Valuable as the intended statute may be found,

it is expressly declared that "this Act shall not extend to Scotland." Again, the Acts so repealed are limited by the provision that "such repeal shall not repeal any enactment so far as it relates to Scotland." So these statutes are still to be in observance in Scotland and in abeyance in England. This is all the more astonishing since it is expressly declared "an inland bill is a bill which is both drawn and payable within the British Islands, and drawn upon some person resident therein." The British Islands is again defined to mean "any part of the United Kingdom of Great Britain and Ireland." It is thus made obvious that many of the provisions of the Act must of necessity apply to Scotland wherever one of the parties resides in England or Ireland, and another in Scotland. By many of the provisions very great modifications are made on the law of bills. They need not now be dated, or the place where drawn, or the place where payable, mentioned. It is provided that "a bill shall not be invalid by reason only that it is ante-dated or post-dated, or that it bears date of a Sunday." For many years the laws on mercantile dealing have become closer assimilated between the sister kingdoms. The recent mercantile amendment Acts made great strides in advance in this most desirable object. Unless, however, some great amendment be made in this projected statute, so as to admit Scotland to participate in its benefits, it is to be feared that the diversity of practice between the two sections of the kingdom will be made very great, irreconcilable, and disastrous. We have carefully examined the many clauses, and we cannot perceive how, if the enactments are really beneficial to the merchants on the south, those on the north should be excluded from participating in these benefits. It is obvious that from the multiplicity of commercial dealings between the two countries innumerable questions will straightway arise under this Act if passed by the British Parliament, whether bills and cheques passing from one portion of the United Kingdom are to be ruled by this intended Act or by the separate laws peculiar to the one or the other section. This is the more to be expected seeing that the Act is intended to provide "that the validity of a bill as regards requisites in form shall be determined by the law of the place of issue, and the formal validity of the supervening contracts, such as acceptance or indorsement, or acceptance *supra* protest, shall by the law of the place where such contract was made." This last provision seems very unnecessarily repeated in a subsequent clause. But there is this very peculiar clause: "Provided that where an inland bill is indorsed in a foreign country the indorsement shall be interpreted according to English law." Thus a bill drawn and made payable in Scotland but indorsed in a foreign land, though that land recognises Scotch law, still the indorsement must be interpreted by English law.

Chambers of Commerce ought immediately to have their attention directed to this Bill, which will, if it becomes law, materially

infringe on the practice of bills between the two countries, which at present are nearly identical, and introduce rules diametrically opposite. It is to be regretted that the Edinburgh Chamber of Commerce, misled by the Act being limited to England, has declined to take any notice of the measure, little thinking how any law regulating bills in England must of necessity materially affect Scotland. Our two law officers having seats in Parliament should have their attention instantly directed to its clauses. NESTOR.

Digesting and Indexing.—Mr. W. H. Bailey, of North Carolina, writes some interesting and original suggestions to the *Central Law Journal* on the subject of "digesting and indexing." He agrees with Mr. Austin Abbott that "it ought to be established as an inflexible rule to use the noun as the initial word and not the adjective. Thus, Actions, civil; Actions, criminal; not Civil Actions, or Criminal Actions." "Indictment" he would put under Pleading, criminal; "Declaration" or "Complaint," under Pleading, civil. This is well enough, perhaps, but is not "criminal law" rather too broad a subject to be made a mere subdivision of "actions"? We believe however in putting all the subordinate heads of "criminal law," such as homicide, larceny, etc., under Criminal Law. We agree with him, too, in dispensing with Husband and Wife, and making a generic head of Marriage, with subdivisions of Dower, Divorce, etc. It seems to us he refines too much upon the use of catch-words and cant-words. We hardly approve of "Daffa Down Dilly," for example, as a reference to the famous case of slander of an attorney. The man who could remember that could remember Defamation on Attorney. Mr. Bailey will find a cross-referencer to his mind in the editor of the North Carolina Statutes, who puts down, "Stud-horses, see Religious Societies." On turning to the latter we find that it is against the law to exhibit such animals within a specified distance of a meeting of any religious society—it being feared that the operations of nature will prove more attractive to Kentuckians than the services of the sanctuary. Mr. Bailey observes: "It is astonishing how little our indexers have availed themselves of a great many good old words, such as Fiduciary, Alibi, etc., and coined words such as Betterments, Contractee, Distributee, Cablegram, Licensee, and the like, and why they do not coin words as needed, such as Addressee (party written to), Wiree (party telegraphed), Homesteader, Usuree, etc." Now "contractee" is "a vile phrase," for a "contractee" is also a contractor. It is different with Licensee and Distributee. There is no need of Usurer or Usuree; Usury tells the whole story. Homestead will cover Homesteader; Telegraph will embrace Telegrapher and Wiree. We partly agree with Mr. Bailey when he says, "Let all such headings as Administrators, Adultery, Affidavit, Agreement, Alimony, Amendment, Answer, Assignment, Bills of Lading, Certiorari, Cities, Clerks, and many others, be used only as cross-

references, reserving on the guiding principle already stated such apparent subdivisions as Advancement, Affray, Agency, Appeal, Arrest, Assault, Attachment, Attorneys, Bankruptcy, Bastardy, Boundary, etc." But several of these have independence enough to stand alone, it seems to us.—*Albany Law Journal*.

VACATION ARRANGEMENTS.

The Lord Ordinary on the Bills will sit in Court on WEDNESDAY, 12th April, and WEDNESDAY, 10th May, each day at eleven o'clock, for the disposal of motions and other business falling under the 93rd section of the Court of Session Act, 1868; and Rolls will be taken up on MONDAY, 10th April, and MONDAY, 8th May, between the hours of eleven and twelve o'clock.

Box-Days.—The Lords appoint THURSDAY, the 6th day of April, and THURSDAY, the 4th day of May next, to be the box-days in the ensuing Vacation.

Bill-Chamber.—The following is the Bill-Chamber Roster for the ensuing vacation:—

Monday, March 20, to Saturday, April 1—Lord KINNEAR.

" April 3, " 15 " SHAND.

" " 17, " 29 " { RUTHERFURD
CLARK.

" May 1, to Thursday, May 11 " LEE.

Spring Circuits.—The following are the arrangements for the Spring Circuits:—

SOUTH.—The Lord JUSTICE-CLERK and Lord MURE.

Jedburgh—Tuesday, 18th April.

Ayr—Thursday, 20th April.

Dumfries—Thursday, 27th April.

Æ. J. G. MACKAY, Esq., Advocate-Depute.

J. M. M'COSH, Clerk.

NORTH.—Lords DEAS and CRAIGHILL.

Inverness—Tuesday, 28th March.

Dundee—Tuesday, 4th April.

Perth—Tuesday, 11th April.

Aberdeen—Thursday, 13th April.

R. V. CAMPBELL, Esq., Advocate-Depute.

HORACE SKEETE, Clerk.

WEST.—Lords YOUNG and ADAM.

Stirling—Wednesday, 22nd March.

Inverary—Wednesday, 12th April.

Glasgow—Thursday, 20th April.

A. TAYLOR INNES, Esq., Advocate-Depute.

ÆNEAS M'BEAN, Clerk.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF STIRLINGSHIRE.

Sheriffs GLOAG and BUNTINE.

TAYLOR v. SHAW-STEWART.—December 14, 1881.

Damages for breach of contract—Question as to necessity for personal citation within the county to found jurisdiction rations contractus.—This was an action at the instance of a tenant against his landlord for recovery of damages in respect of the latter's failure to implement the provisions of the case between the parties. Certain preliminary objections were stated to the action, and it was pleaded, *inter alia*, that the defender not being resident or domiciled in the county of Stirling, and not having been personally cited in that county, was not subject to the jurisdiction of the Sheriff thereof. *Held* that the lease founded on having been entered into, and intended to be fulfilled, in Stirlingshire, there was jurisdiction *rations contractus*, and that personal citation of the defender within the county was unnecessary.

Sheriff-Substitute Buntine issued the following interlocutor and note:—

"*Stirling, 18th October 1881.*—Having heard parties' procurators on the closed record and whole cause, and made avizandum, Repels the first, second, and third pleas stated for the defender; and before answer allows the parties a proof of their respective averments, and to the pursuer a conjunct probation: Appoints the cause to be enrolled for next Court to fix a diet of proof.
J. R. BUNTINE.

"*Note.*—The pursuer in this action is a tenant farmer whose lease of a farm in Stirlingshire expired at Martinmas last, and he sues his landlord for damages for alleged non-fulfilment of conditions in his lease—(1) to erect a cattle-shed, and (2) to put the farm buildings into good and tenantable condition. The defender is proprietor of the lands of Carnock in the county of Stirling.

"The mansion-house of Carnock is let, and the defender is a bachelor and resides with his father, Sir Michael Shaw-Stewart, at Ardgowan House, Renfrewshire.

"In these circumstances the pursuer's agent sent a copy of the summons to the defender's agent at Greenock, who after some correspondence accepted service for the defender by the following minute on the summons: 'Greenock, 9th July 1881.—As authorized by the defender, Michael Hugh Shaw-Stewart, Esquire, I hold the foregoing petition to be duly executed against him under reservation of all defences.'

"The petition was called in due course, and the defender has entered appearance and lodged defences.

"The first defence stated is 'that the defender not being resident in the county, or cited personally within the county, the Court has no jurisdiction.'

"The question raised by this plea is undoubtedly novel, difficult, and important, but after mature consideration the Sheriff-Substitute has come to be of opinion that it is not well founded. The case of *Pirie v. Marden* (20th February 1867, 5 Macph. 497) authoritatively decided that a pursuer who has undertaken to perform a contract within a county is liable to the jurisdiction of the Sheriff Court of that county in all actions having reference to the contract, provided he be personally cited within the territory. And this holds true in actions of damages for non-fulfilment of the contract (see *Kernack*, 9th July 1861, 9 M. 984).

"It is of great importance here to observe that the jurisdiction of the Court to decide all questions concerning contracts which fall to be implemented within its territory may exist although it cannot be exercised.

"It cannot be exercised against a party who is resident beyond the territory

unless he be certiorated by personal citation within the territory or appear and prorogate the jurisdiction (see Erskine, book i. tit. 2, sec. 16 *et seq.*). In other words, the personality of the citation is not essential to the jurisdiction, which exists apart from it. Thus it is thought that there is no doubt that the Sheriff would have jurisdiction to decide a question like the present supposing the defender accepted service of the petition by a minute written by himself or his agent within the county.

"The peculiarity of the present case is that the defender's agent accepted service by an indorsation executed without the territory and appended a reservation of all defences.

"The Sheriff-Substitute has after careful consideration come to the conclusion that the acceptance of the service is equivalent to the personal citation requisite in the circumstances, and to personal citation within the county of Stirling. It declares that the petition is duly executed against the defender.

"It therefore is conclusive against the defender stating any plea that he was not legally cited. It is equivalent to personal service either in Renfrewshire or Stirlingshire, or anywhere else, to personal service within that territory where service in the circumstances was necessary.

"But it was contended that the defence of want of jurisdiction was reserved in the indorsation, with all other competent defences. But that defence depends upon whether or not there was personal service within the territory. No defence competent against the legality of the citation was reserved, and if the citation was legal, then the defence of want of jurisdiction falls to the ground. The defender is barred from stating that the petition was not duly executed.

"The Sheriff-Substitute has therefore repelled the plea of want of jurisdiction on the ground, shortly, that personal citation within the territory is not a legal solemnity, but may be waived by the defender, and that the defender authorized his agent to make such a waiver in this case.

"It is unnecessary to consider the arguments founded upon the jurisdiction exercised by the Supreme Courts over Scotch landed proprietors resident abroad, because that ground of jurisdiction has not been extended to the Sheriff Court in any decision so far as known to the Sheriff-Substitute.

"It is satisfactory, however, to be able to decide that a tenant is not precluded from enforcing the provisions of his lease against his landlord in the Sheriff Court of the county where the farm is situated, because his landlord has his residence in another part of Scotland or has no fixed residence at all.

"The Sheriff-Substitute has repelled the plea of *mora* stated by the defender, and reserved a number of other defences, including the plea of acquiescence and compensation, until the whole circumstances shall have been ascertained in a proof. He thinks it right, however, to say that he will exclude any proof of the damages said to be due to the defender's failure to put the offices into tenantable condition, because he thinks that the pursuer is barred from taking that objection by his acceptance of these as sufficient when he signed the lease.
J. R. B."

The defender appealed to the Sheriff, before whom the case was debated by counsel, after which the following interlocutor was pronounced:—

"*Edinburgh, 14th December 1881.*—The Sheriff having resumed consideration of the cause, Sustains the fifth plea in law for the defender: *Quoad ultra* adheres to the interlocutor of the Sheriff-Substitute dated 18th October, and remits the cause for further procedure, reserving expenses. W. E. GLOAG.

"*Notes.*—At the debate in the appeal counsel for the defender maintained—(1) that his first plea, challenging the jurisdiction of the Court, should be sustained, and that the action should on that account be dismissed; and (2) if that plea were not sustained, that his fifth plea, to the effect that the pursuer is not entitled to claim damage on the ground that, as he avers, the farm buildings were not in good and tenantable condition. The Sheriff has formed an opinion adverse to the defender's contention as to the first plea, but in accordance with it as to the fifth plea. But he thinks it proper to observe that

in sustaining the fifth plea, he does so on the understanding that it has no reference to the cattle-shed. It is still open to the pursuer to claim damages on account of the defender's alleged failure to erect a new cattle-shed. Whether he can prevail in that claim will of course depend on the proof.

"The question raised by the first plea appears to the Sheriff to be of no consequence to either party.

"The defender was, however, entitled to state it and have it decided; and it certainly appears to the Sheriff to be or to involve a question of novelty, and of no little difficulty.

"The circumstances under which it is raised are these. The action is an action of damages for breach of a contract of lease. It might, perhaps, be difficult to hold that the claim in respect of the defective state of the farm buildings is a claim for damages for breach of the contract of lease, because the lease contains no stipulation on the subject in favour of the pursuer. But as the Sheriff has come to the conclusion that that claim cannot be sustained, it may be left out of account, and the action may be considered as an action of damages for failure to erect the cattle-shed, and to that extent it is nothing but an action of damages for breach of the contract of lease.

"The farm let by the lease belongs to the defender, and is situated in Stirlingshire. The lease was signed by both parties in Stirlingshire. The *locus contractus* is the same as the *locus solutionis contractus*, and is in the county of Stirling.

"It is averred by the defender that he is resident and domiciled in Renfrewshire. This is not admitted on record, and the pursuer avers that the defender occupied a lodge in the county of Stirling. The Sheriff is, however, satisfied from what was said at the debate that the defender's statement is true. Although it may be that his plea could in no view be sustained without some inquiry or admission by the pursuer.

"The defender has not been cited in this action at all, but this minute by his agent has been appended to the summons: 'Greenock, 9th July 1881.—As authorized by the defender, Michael Hugh Shaw-Stewart, I hold the foregoing petition to be duly executed against him under reservation of all defences.'

"The authority of the defender's agent to append this docquet has not been questioned. It is of the same effect as if it had been written and signed by the defender.

"These appear to be the sole elements for decision of the question whether the defender is subject to the jurisdiction of the Court.

"There is not authority for holding that jurisdiction in a Sheriff Court can be rested on the defender's ownership of heritable property within the sheriffdom. *M'Bay v. Knight* (22nd November 1879, 7 R. 255) implies the contrary.

"There may no doubt be jurisdiction in a Sheriff Court *ratione rei sitæ*; and Erskine (i. 2, 17), when treating of that ground of jurisdiction, specially adverts to the case of a defender whose domicile is not within the territory, sued before an inferior Court *ratione rei sitæ*. But in this case the Sheriff doubts whether the jurisdiction of the Court can be safely rested on that ground; for the action, though doubtless connected with the farm of which the pursuer was tenant, is not an action which directly relates to it.

"The Sheriff-Substitute, however, has sustained his jurisdiction because the contract libelled was entered into and intended to be fulfilled in Stirlingshire; and the Sheriff concurs in that opinion.

"Up to a certain point the law is clear and the case presented no difficulty.

"Nothing is better settled as a rule of general jurisprudence than that the tribunals of a country where a contract is to be performed have jurisdiction to enforce it, provided the party called as defender to the action or proceeding is for the time, however temporarily, within the county (per Lord Justice-Clerk Inglis in *Sinclair v. Smith*, 17th July 1860, 22 D. 1475). In that case the jurisdiction of the Court of Session to entertain an action of damages for breach of a promise of marriage said to have been given in Scotland was sustained

against a defender resident in England, but personally cited when in Scotland. The defender was, it is true, a Scotsman by origin. But the case was decided independently of that specialty, and is a clear affirmation of the principle of jurisdiction *ratione contractus* when there has been personal citation in Scotland.

"In *Pirie v. Warden* (20th February 1867, 5 Macph. 497) this principle was applied in an action brought in a Sheriff Court against a foreigner to enforce implement of a contract, or to recover damages failing implement, where the place of fulfilment of the contract was in the sheriffdom, and where the defender was personally cited there. In that case the Lord Justice-Clerk (Inglist) put the following illustration: 'Suppose a man domiciled in East Lothian makes a contract to deliver corn in Midlothian, and is cited in the latter county to answer to an action for breach of the contract, he would, I think, be amenable to the jurisdiction of the Sheriff of Midlothian.'

"In like manner in *Kermick v. Watson* (7th July 1871, 9 Macph. 984) the jurisdiction of a Sheriff to try an action of damages for slander uttered within his jurisdiction was sustained where the defender was personally cited within the jurisdiction.

"In all these cases there was personal citation within the territory. But they do not decide that it is essential or that without it there would not have been jurisdiction. But in the case of *Wylie v. Lyle* (11th July 1834, 12 S. D. 927), where the action was a declarator of marriage said to have been contracted in Scotland, it was found that the Court had no jurisdiction because the defender was resident and domiciled in England, and had not been cited personally in Scotland, but only edictally.

"It is thought that if he had been cited in Scotland the jurisdiction would have been sustained.

"That was a decision by the whole Court, and is of great authority, and it may be held to have decided that jurisdiction cannot be founded in the Court of Session *ratione contractus* against a foreigner without personal citation in Scotland.

"It has not, however, been decided, so far as the Sheriff is aware, that in a parallel case personal citation within a sheriffdom is necessary to found jurisdiction *ratione contractus* over a defender not resident in the sheriffdom, although the Sheriff is not aware of any case in which jurisdiction *ratione contractus* has been sustained without personal citation within the territory.

"The Sheriff-Substitute has so interpreted the minute by the defender's agent holding the petition to be 'duly executed' as to avoid that question. He reads that minute as importing a concession that the petition is to be held as effectually executed in such a manner as will support jurisdiction; so that assuming it to be theoretically essential that citation should be personal within the sheriffdom, he regards it as conceded that the case should be taken as if the defender had been cited in that manner, and in truth it may not unfairly be said that unless the minute means as much as that, it is less a concession than a jest, if it be true that personal citation in the sheriffdom is essential. But on the other hand this interpretation of the minute ascribes to it a meaning which its words do not necessarily nor very easily bear, and which the defender decidedly disclaims.

"It truly assumes that the defender meant to admit jurisdiction, when the first thing he does in the case is to deny it.

"It certainly seems to involve the defender, in respect of his own concession, in consequences which he cannot be held to have contemplated.

"The Sheriff has great doubt whether a judgment sustaining the jurisdiction can safely be vested on this interpretation of the minute; and he is, on the whole, inclined to read it as meaning no more than what is generally meant when service is accepted, namely, that the defender agrees to dispense with the formality of sending a messenger to serve the summons; and he holds the summons to be in the same position as if it had been executed against the defender in Renfrewshire either personally or at his dwelling-place. Such an

interpretation satisfies the words of the minute, and the Sheriff cannot see any sufficient warrant for stretching their meaning further.

"In this case, therefore, in the opinion of the Sheriff, the element of personal citation within the sheriffdom is wanting. The Sheriff has, however, come to the conclusion that citation in Renfrewshire (which the minute must be held to admit) is equivalent to citation in the sheriffdom.

"Citation is the act of a judge in the exercise of jurisdiction, and implies it, and it is therefore hard to see how it can possibly create it.

"If there be not jurisdiction to determine a cause duly brought before the Court, personal citation certainly will not confer it. It may no doubt be necessary to extricate jurisdiction. For, to use the language of Erskine, 'jurisdiction cannot have the least operation when both the person and estate of the defender are withdrawn from the judge's power' (i. 2, 20).

"In the case of *Sinclair v. Smith* the Lord Justice-Clerk (Inglist) points out that it was of no consequence that the service should be personal, except that personal service was the only effectual service possible in the circumstances of that case, in which a foreigner was cited to appear before the Court of Session. In truth it is power over the defender arising from his presence in the territory, and not any technical formality, which is the thing which is essential. If the defender in *Sinclair v. Smith* could have been validly and effectually cited otherwise, personal citation would not have been essential.

"It is advisable to keep in view what citation originally was, and what in theory it still is. This is very clearly explained by Lord Stair, who says that the word citation is derived *a citando* because it hastens the defender's appearance, and he refers to the ancient Roman way of citing, when a complainant brought his opponent before the Court by bare force, a course which, he says, 'hath been long since set aside as being apt to beget breaches of the peace, and in place thereof, summons by apparitors have succeeded, wherein there must be some certification, which may rather induce the person summoned to appear than to fall under these just penal consequences by their contumacy' (Stair, iv. 3, 27).

"To a similar effect Lord Cowan in *Sinclair v. Smith* (22 D. 1484) said, 'Did the forms of judicial procedure permit of the injured party taking the defaulter before the judge *oborto collo*, no obstacle could possibly be imagined to exist to the judge giving judgment in the case. But in truth this is at the bottom of the whole principle. Citation comes in the room, by our municipal law, of actual apprehension of the defaulter.' He is personally apprehended and cited to compare; judicial procedure has commenced against him; and if he departs after that from the territory it is his own doing. The jurisdiction of the judge cannot be thereby affected. See also *Kay v. Burnet*, 7th March 1780, reported in Fraser's 'Domestic and Personal Relations,' vol. i. 695.

"The principle, therefore, applicable to such questions appears to be clear. The judge of the territory where a contract has been made or should be implemented is competent to determine as to the rights arising from that contract, but he has no power unless the party be present or has estate in the country. The presence of the party confers that power which is exercised not by compelling his immediate presence, but by giving him a command in place of that compulsion, which command he is under an obligation to obey.

"It is obvious that edictal citation cannot come in place of actual apprehension. Beyond the country it is of no validity, and can impose no obligation on a foreigner to obey it. It can do no more than give notice to the defender of the nature of the demand made against him.

"Hence it is in a question of jurisdiction of no effect, and neither indicates nor confers any power on the Court over the party; and that appears to have been the reason why the objection to the jurisdiction of the Court was sustained in the case of *Wylie v. Lays*, and for that reason it may be that personal citation in the territory of the judge is an essential to jurisdiction *ratione contractus* over a foreigner. Jurisdiction founded on the ownership of heritable

property or on arrestment *jurisdictionis fundandæ causa* depends on somewhat different principles.

"But though personal citation within the territory may be a requisite to operative jurisdiction *ratione contractus* where the defender is domiciled and resident abroad, the question remains, Is it equally essential in a question as to the jurisdiction of a Sheriff over a defender resident in Scotland, but not within the territory of that Sheriff? The Sheriff is of opinion that it is not equally essential. Erskine (i. 2, 17), in treating of the jurisdiction of an inferior Court *ratione rei sitæ*, says that the pursuer must apply for letters of supplement from the Court of Session, implying of course that in the case there might be jurisdiction without personal citation within the territory.

"It is not now necessary to obtain letters of supplement. By section 24 of the Act 1 and 2 Vict. c. 119, it is provided that it shall be competent to cite all persons within Scotland as parties in any action in any Sheriff Court, who may be amenable to the jurisdiction of such Court in respect of such action, 'and all such warrants shall have the same force and effect in any other sheriffdom as in that in which they were originally issued, the same being first indorsed by the Sheriff Clerk of such other sheriffdom.' Had the defender in virtue of this provision of the statute been personally in Renfrewshire, the effect would have been the same as if he had been personally cited in Stirlingshire. The effect of personal citation in Stirlingshire would have been to impose on the defender an obligation to compare in the Sheriff Court at Stirling to answer to this cause. Personal citation in Renfrewshire would have put him under the like obligation, and it is impossible to maintain that service at his dwelling-place in Renfrewshire would have had any different or lesser effect than personal service would have had.

"By section 12 of the Act 39 and 40 Vict. c. 70, the indorsation of the Sheriff Clerk of the sheriffdom in which the service is to be made is dispensed with. The effect of its provision otherwise so far as it bears on this question seems much the same as that of the former statute.

"On the whole, the Sheriff is of opinion that due citation, personal or at the defender's dwelling-place in Renfrewshire, would have imposed on the defender the obligation to compare and answer to the cause in which the Sheriff has jurisdiction *ratione contractus*, and as the defender has agreed that the case is to be dealt with as if there had been such citation, the Sheriff is of opinion that the necessary elements to found jurisdiction in the Sheriff Court exist. In that view the words 'reserving all defences' have no meaning so far as the question is concerned; and in any view their only fair meaning seems to be that all defences to the claim are reserved.

"The defender's counsel insisted that the fifth plea should be sustained, and the Sheriff sees no sufficient answer to it; he cannot read the letter of the defender's agent as qualifying the effect of the lease signed a month afterwards. Probably the Sheriff-Substitute was not asked to sustain this plea, because the opinion expressed at the close of his note is wholly in favour of it.

"W. E. G."

Act.—Dickson.—Alt.—Robertson.

SMALL DEBT COURT OF RENFREWSHIRE.

Sheriff SMITH.

HIGGINS v. DALGLEISH AND ROBERTSON.

Trustee on trust-estate—Arrestment—Forthcoming.—The facts of the case are as follows: On 29th June 1881, Francis Higgins, a spirit merchant in Stockwell Street, Glasgow, obtained decree against John D. Dalgleish, grocer, Gourrock, for £3, 8s. 6d. of principal, and 6s. 4d. of expenses. Mr. Dalgleish was then in difficulties, and on 27th July executed a trust-deed in favour of Mr. Neil Robertson, accountant, in Greenock. Robertson obtained possession

of Dalgleish's estate, and on the 11th August following an arrestment was used in the hands of Higgins, who afterwards on the 26th August raised an action of furthcoming, claiming to be entitled, in virtue of his arrestment, to payment in full out of the trust-funds. Higgins held that the funds really belonged to Dalgleish, and that the trust-deed could not prevent him from attaching them by diligence, as he was a non-acceding creditor. Robertson defended the action, and admitted that he was possessed at the date of the arrestment of funds more than sufficient to pay his claim; but contended that these funds were held by him under the trust-deed, and must be devoted to the special purpose of distributing equally among the creditors acceding to the trust-deed, according to their respective rights and interests. The case was argued before Sheriff Smith on two occasions, and by him taken to *avizandum*.

Sheriff Smith, on the case being called, said Mr. Brough, the Sheriff Clerk, had received a letter which threw some light on the practice in Glasgow. This letter was from the Sheriff Clerk, and it appeared from it that the Glasgow practice was the same as the Greenock practice, both of them differing from that of Edinburgh. The question, Mr. Sellar said, had been raised in the Court there from time to time in various forms for many years past, and so far as he knew, or could find, the Glasgow practice agreed with that of Greenock. It could hardly be said that the laws of the Council, or that the decided cases were on the same line. He (the Sheriff) had made up his mind before seeing Mr. Sellar's letter—and he was exceedingly glad that Mr. Sellar's letter confirmed his own—to adhere to the practice that had prevailed in that Court during all the time that he had sat there, and, he believed, during years before that. He found that a case had been raised some five years ago, when judgment was pronounced in the same way as he was going to deal with the present question. After stating the facts of the case, his Lordship said that the question he had to determine was whether Mr. Robertson, having the wherewithal to pay Higgins when the arrestment was used by Higgins, and indeed having still, it seemed, the wherewithal to pay him, was bound to make the sum of money forthcoming to Higgins, and thereby diminish the fund which he held in trust for the creditors under the trust-deed. It was pleaded for the trustee by Mr. Auld that the recognised procedure in this Court had been for many years to give no effect to arrestments used in such a case; and it was stated that that was the practice not only here but in other Sheriff Courts. It was quite plain from the letter of the Sheriff Clerk of Lanarkshire, who was a man peculiarly well qualified to instruct them on the procedure that was usual and proper in Sheriff Courts—it was quite plain that Mr. Auld had rightly stated what was the practice not only in this Court, but in the Sheriff Court of Lanarkshire, and in the great city of Glasgow especially. But it was pleaded strenuously and ably on behalf of Higgins by Mr. Shearer that even supposing Mr. Auld's statement of the law was recognised here and in Lanarkshire to be perfectly true, it was founded on a mistaken view of the law, and that in one important Sheriff Court, probably the Sheriff Court which after Glasgow was the most important Sheriff Court in Scotland, the practice was otherwise. He was referred to a decision by Sheriff Hamilton of Edinburgh supporting that view, and Mr. Shearer handed to him a cutting from a newspaper bearing out a judgment of Sheriff Hamilton exactly on the point now disputed, and seeing that his view of the law was different from that entertained here and in Glasgow, he thought it right to communicate with Sheriff Hamilton, because he fancied there might be some special circumstances affecting the decision. Sheriff Hamilton in answer took the view that the Edinburgh procedure, which was directly opposite to that of Glasgow and Greenock, was the correct procedure, and that it necessarily followed on the decision given in the case of *Nicholson and Johnstone*. After referring to this and another decision bearing upon the point in dispute in this case, his Lordship said that it would not be right to sanction Mr. Shearer's argument, because even though he was convinced that it was sound, he was not entitled, especially in the Small Debt Court, from which there was no appeal, to decide in point

of law in a contrary sense to the unaltered decision of the Supreme Court. He came to the conclusion that he must sustain the defences stated for Mr. Robertson, and grant him expenses.

Act.—Shearer.—*Al.*—Auld.

Notes of English, American, and Colonial Cases.

MUNICIPAL ELECTION PETITION.—*Practice—Interlocutory order—Appeal—Mayor—Respondent—Conduct of returning officer.*—An appeal lies from an order of a Divisional Court on an interlocutory question with regard to a municipal election petition.—*Harmon v. Park* (App.) 50 Law J. Rep. C. P. 227.

By the Corrupt Practices (Municipal Elections) Act, 1872 (35 and 36 Vict. c. 60), s. 2, "Returning officer means a person under whatever designation presiding at an election."—*Ibid.*

By section 13, sub-section 6, "Where a petition complains of the conduct of a returning officer he shall be deemed to be a respondent."—*Ibid.*

The mayor of a borough, divided into wards, decided, under 38 and 39 Vict. c. 40, s. 1, sub-s. 3, that one of two candidates for the office of town councillor for one of the wards was disqualified, and the other was declared to be elected. The defeated candidate petitioned, making the mayor a respondent. On application to strike out the mayor's name,—*Held* (by Lord Selborne, L.C., and Brett, L.J.), that the mayor was not returning officer. (Baggallay, L.J., doubting.) *Held* (by the whole Court), that, if the mayor were returning officer, the petition questioning his decision did not complain of his conduct within section 13, sub-section 6, and therefore he was wrongly made respondent. Decision of the Common Pleas Division reversed.—*Ibid.*

NEGLIGENCE.—*Horse bolting without assignable cause.*—A horse being driven in a public thoroughfare, suddenly, and from no apparent or assignable cause, bolted, and notwithstanding the efforts of the driver, who was not shown to be lacking in skill, became totally unmanageable and caused injury to plaintiff:—*Held*, that there was no evidence for the jury. *Held*, further, that there was no evidence of negligence for the jury arising from the fact that the horse cast a shoe directly after he bolted, and that the driver did not call out or give any warning.—*Hammick v. White* (11 Com. B. Rep. N. S. 588; 31 Law J. Rep. C. P. 129) confirmed. *Manzoni v. Douglas*, 50 Law J. Rep. C. P. 289.

BOTTOMRY BOND.—*Communication—Maritime law and law of the flag.*—Communication when possible with the owners of a ship and cargo is necessary to the validity of a bottomry bond, and this principle of maritime law will be enforced when a bottomry bond is sued on in this country, even though by the law of the ship's flag non-communication does not invalidate a bond.—*The Gaetano e Maria*, 51 Law J. Rep. P. D. and A. 7.

SHIPPING LAW.—*Charter-party—Construction.*—"So near thereunto as she may safely get"—*Block in dock named in charter-party.*—A ship was chartered to proceed to "London Surrey Commercial Docks or so near thereunto as she may safely get and lie always afloat." On arrival outside the dock, admittance could not be obtained owing to the dock being already full. The master then went to Deptford Buys, the nearest place where the ship could lie with safety, and called upon the charterer to take delivery there. On the charterer refusing to do so, the master discharged the goods by lighters on the wharves of the Surrey Commercial Docks. In an action by the shipowner for demurrage and charges,—*Held*, first, that the place of discharge being named by both parties in the charter-party, neither was bound to provide for the admittance of the ship or liable for its exclusion; secondly, that the ship had not completed its primary contract to proceed to London Surrey Commercial Docks by merely arriving outside the dock gates; but, thirdly, that it had carried out the alternative contract to go as near thereunto as it could safely get, and that the charterer was therefore liable for demurrage.—*Dahl v. Nelson, Donkin, & Co.* (H. L.) 50 Law J. Rep. Ch. 411.

THE JOURNAL OF JURISPRUDENCE.

A SKETCH OF THE HISTORY OF SCOTS LAW.

AN ADDRESS (IN PART) DELIVERED AT THE REQUEST OF THE MEMBERS OF
THE SOCIETY OF SCOTS LAW IN THE UNIVERSITY OF EDINBURGH, BY
Æ. J. G. MACKAY, ADVOCATE.

(Continued from page 129.)

IV. The half-century (1682-1732) which followed the first publication of Stair's Institutions was occupied with the momentous changes which laid the foundation of the modern Constitution of Scotland as of England. The success of the Revolution settled the Crown on a Protestant dynasty, and limited the rights of the monarchy by fundamental laws. The Parliaments of the two kingdoms at last united under Anne, an object which had been constantly aimed at by wise statesmen since the accession of James VI. to the English throne; but the Scottish people, though their material gains were enormous through their subsequent admission to free-trade with England and her colonies, were deeply wounded in their pride by ceasing to have an independent legislature, and by the small attention paid to their wishes and interests in the British Parliament, in which they obtained an inadequate representation. The Jacobite rebellion owed its strength to this feeling as much as to the chivalrous attachment of the Highland chiefs and clans to the fallen race of their ancient kings. It would be difficult to say whether the last Stuarts or the first Guelfs were the least worthy representatives of the rival causes of Legitimacy and Constitutional Government, but the brief struggle was more than a personal or national one, and the quelling of the Jacobite risings struck the final blow at the feudal system of law, and established a monarchy limited by the rights of the people, and a representative Parliament as the future form of government of Great Britain.

The history of Scottish law during this period is mainly relative

to the constitutional changes, and in so far as they concern the settlement of the form of government, and not private law, they are beyond the scope of this sketch. But constitutional changes which, as regards Scotland, transferred the supreme legislative and judicial powers to new bodies, altered the form and jurisdiction of the Courts, and introduced new law, chiefly in the department called by English lawyers Crown Law, materially affected private rights, and cannot be passed over even in a rapid survey of the progress of the law. The Revolution Settlement left the Parliament and judicatures of Scotland unaltered, but the Declaration of the Estates of Scotland concerning the Claim of Right, and offer of the crown to the King and Queen of England, enunciated some important principles relative to the administration of the law rendered necessary by the conduct of the two last kings, and which, by the acceptance of that offer, became henceforth established principles of the law of Scotland. It was declared that the sending letters to Courts of justice ordaining the judges to stop or desist from determining causes, or ordaining them how to proceed in causes depending before them, and the changing of the nature of the judges' gifts *ad vitam aut culpam* into commissions *durante bene placito*, are contrary to law, and that it was the right and privilege of the subjects to protest for remeid of law to the king and Parliament against sentences pronounced by the Lords of Session, providing the same do not stop execution of these sentences.

Thus the independence of the judges, so necessary in a country where their appointment has been generally due to political reasons, and the right of appeal to Parliament, for which the Scottish Bar had made so gallant a struggle at the time of the secession of the advocates, and which was a safeguard against the arbitrary power of the Court of Session of which Buchanan had complained, were placed on a sound basis.

The other alterations made in the law between the Revolution and the Union were not many in number, but some of them were of considerable value. The preference of real rights was again declared to depend on the date of the registration of sasines,¹ and the Register of Sasines and other registers which affected such rights were of new regulated.²

The Court of Session was henceforth to advise all causes with open doors³ unless in special cases; an enactment by which the publicity of legal procedure, as contrasted with the Inquisitorial system of the Ecclesiastical and Continental Courts, was secured.

The bankruptcy law was further developed in the direction already commenced by the statute of 1621, by the Act of 1696, which defined the facts constituting notour bankruptcy.⁴

The right of a father to nominate tutors and curators to his

¹ 1693, c. 22.

² 1693, c. 23.

³ 1693, c. 42.

⁴ 1696, c. 5.

minor children was established,¹ and tutors and curators were protected from undue challenge of their accounts by the introduction of the decennial prescription after the majority of their wards.² The dangerous practice of subscribing bonds and deeds blank in the name of the creditor was prevented by declaring them null.³

The progress of commerce was marked by the Act which gave inland bills⁴ the same privilege as to execution already conferred on foreign bills of exchange.⁵

And finally, one statute, which, although it passes beyond the immediate subject of this essay, is too important to be passed over, gave to Scotchmen, unfortunately in a complicated form, the benefits of the Habeas Corpus Act, preventing wrongous imprisonment and undue delays in trial by regulating the amount of bail and allowing any prisoner not admitted to bail to force on his trial within a comparatively short period by the process called running letters.⁶

The Union had a much more considerable and direct influence on the future of Scottish jurisprudence than the Revolution Settlement. Although it was agreed as one of the general principles of the Treaty of Union that Scotland was to retain her laws, the treaty, as finally adjusted and ratified by Acts of the Parliaments of both kingdoms, made wide exceptions from this principle. The revenue laws of England relating to Trade, Customs, and Excise became in future applicable to Scotland; and while all other Scottish laws were continued, it was declared that they were to be alterable by the Parliament of Great Britain, with this distinction, that those relating to public rights were to be alterable absolutely, but those relating to private rights only for the evident utility of the subjects in Scotland.⁷

The Courts of Session and Justiciary were to continue in all time coming within Scotland as then existing, but to be subject to such alterations as might be necessary for the better administration of justice by the Parliament of Great Britain. On this article Defoe observes in his semi-official account of the Union: "The College of Justice with the Court of Justiciary are here effectually established and confirmed, and their being and constitution cannot be touched, no, not by Parliament. They are indeed to submit to regulations, and it cannot but be reasonable it should be so, but none of these regulations can affect them as a Court."⁸

The Admiralty jurisdiction was in future to be under the Lord High Admiral of Great Britain, but the Scottish Court of Admiralty was to continue always for the determination of maritime causes relating to private rights in Scotland, subject in like manner as the Courts of Session and Justiciary to regulations by the British Parliament. The existing Court of Exchequer was to continue, but only until a new one was settled by Parliament. All inferior Courts

¹ 1696, c. 8.

² 1696, c. 9.

³ 1696, c. 25.

⁴ 1696, c. 38.

⁵ 1681, c. 36.

⁶ 1701, c. 6.

⁷ 1706, c. 7, sec. 18.

⁸ Defoe on the Union, p. 165.

in Scotland were to continue subordinate to the Scottish Supreme Courts, but were otherwise to be subject to alterations by Parliament.

It was expressly declared that no causes in Scotland were to go to any Court in Westminster Hall, a provision that has been recently infringed both in spirit and in letter by the rules of the English judges, so largely taken advantage of, to serve persons out of the jurisdiction with the process of their Courts.

Shortly after the Union a Court of Exchequer on the English model, with English forms of procedure and an English judicial nomenclature, was established in Edinburgh.¹

The English law of treason was also introduced into Scotland,² a provision which ought to have been beneficial, as the Scottish treason law was arbitrary and vague, had not the English judges of the Georgian era unfortunately introduced the dangerous doctrine of constructive treason by a forced and extensive construction of the statute of Edward III. Three years after the Union it was decided that an appeal lay from the final judgments of the Court of Session to the British House of Lords. The right of appeal to Parliament had been one of the leading articles of the Scottish Declaration and Claim of Right after the Revolution, and could not be lost because the Parliament now sat in London instead of Edinburgh.

The effect of these changes both in their immediate and ultimate consequences upon Scottish jurisprudence was inevitable and enormous. A certain amount of English law being introduced into the practice of two Scottish Courts, and Scottish cases being appealed to the House of Lords, Scottish lawyers and judges could not treat English law as a wholly foreign system, though they sometimes unwisely pretended to do so. Scotchmen, both lawyers and others, when members of the British Parliament, became acquainted with the general outlines of English law. Scottish traders, as the freedom of trade began to make its advantages felt, found there were great drawbacks in the diversity of the laws north and south of the Tweed. English Chancellors and Law Lords, though protesting that they administered Scottish law only in Scottish appeals, often proceeded to show that the Scottish law was the same as the English, or if that were impossible, even by the subtlest modes of judicial self-deception, they condemned Scottish law forms and terms as barbarous, and with more justice Scottish procedure as dilatory. After a decent interval the Legislature discovered that the words "always" and "in all time coming" in the Act of Union meant only as long as they chose, and the evident utility of Scottish subjects the vote of a majority in the British Parliament. The best defence of this view was that it is scarcely possible, and if possible it would not be expedient, to bind for ever by any words the supreme power in the State, and that the changes made were for the most part, even when not relished at the time, afterwards acquiesced in by the people of Scotland. A very gradual and subtle,

¹ 6 Anne, c. 53.

² 7 Anne, c. 23.

but not the less certain and on the whole beneficial, assimilation of the laws of the two countries began to take place. It was a considerable time, however, before this tendency to assimilation became visible; for Scotland, though now united under one Crown and represented in the same Parliament, during the eighteenth century still continued to be a distinct country from England, with its separate manners and customs, and even till towards its close a separate, though not widely separate, dialect.

The British Parliament did not at first attempt to make any important changes in the judicatures and law of Scotland, in exercise of the powers of regulation conferred upon it by the Union. The failure of the Rebellion in 1715 gave the opportunity for the only alterations of sufficient consequence during this period to be noticed in such a sketch as the present. The personal services of the feudal vassals, which, under the significant names of hosting, hunting, watching, and warding, had been one of the principal means of carrying on the Rebellion, were abolished or commuted for money payments.¹ But the heritable rights of jurisdiction, which in Scotland, as on the continent of Europe, had existed to an extent unknown in England, were still preserved. Another relic of the old feudal form of government—the institution of Extraordinary Lords in the Supreme Civil Court—was also swept away.

The Institutes of Lord Bankton may be taken as representative of the law of Scotland during this period; for though not published till 1751, they describe the state of its jurisprudence as it had been familiar to a lawyer who began to practise in 1708. This elaborate and comprehensive work has now ceased to have much value except as an historical memorial. It has been crushed between the greatly superior treatises of the more philosophical Stair and the more practical Erskine. While attempting to improve on Stair, Bankton is destitute of the profound learning and clear method of the older lawyer. His work is the product of a period when Scottish law had lost its native energy, and had not yet acquired the new force which contact with English jurisprudence was to give it. Even in that which is the most original part of his Institutes, the parallel between Scottish and English law, his knowledge of the latter was not sufficient to make the comparison really instructive. Still he deserves credit for the absence of prejudice which led him in the middle of the eighteenth century to enunciate a proposition which ought to have been self-evident, but is even in the present day sometimes reluctantly acknowledged, “that since the union of the two kingdoms there is such intercourse between the subjects of South and North Britain that it must be of great moment that the laws of both be generally understood, and their agreement and diversity attended to, so that people in their correspondence may regulate themselves accordingly.”

¹ 1 Geo. I. St. 2, c. 54.

It was a sign of the advance of the mercantile law that Bankton treats of bills and several other common mercantile contracts of modern times in separate titles, while Stair had given them only a passing notice in dealing with the forms of contract known to the Roman law, which, though their principles underlie these as all other contracts, are very far from sufficient for explaining the practical operation of the new instruments under which the business of modern trade and commerce are to so large an extent carried on.

It was during this period that the commencement was made of University education in law by the institution of the Chairs of Civil, Public, and Scots Law in the University of Edinburgh, so that students of law who desired to found their practice on intelligent study had no longer necessarily to resort to the Continental universities. It was unfortunate that English law was not then, and has not even yet been introduced into the curriculum of the Faculty of Law. It would have proved a powerful adjunct towards a rational and well-considered assimilation of the laws of the two countries, which has been carried on by the haphazard method of particular cases reaching the House of Lords on appeal, and the too often ignorant experiments of Scottish members of Parliament in fragmentary legislation.

V. The next period of our legal history (1732-82) carries us over the final suppression of the Jacobite Rebellion to the eve of the French Revolution, by which all Europe was taught in a tragic example the danger of attempting to maintain beyond its term, and in spite of growing abuses, an obsolete system of government incompatible with the new and freer relations of modern society.

A memorial of the close of the struggle between hereditary right and constitutional monarchy in Britain is contained in our Scottish law in the Act by which heritable jurisdictions were at last abolished.

No Scottish monarch had been powerful enough to suppress this parody of justice. Even at the Union these jurisdictions had been recognised as rights of property, and they had escaped unscathed in 1715, but they were now by a wise policy brought up. Their effect had been to exclude the powers of the King's Courts and the impartial administration of justice throughout large districts of Scotland both in civil and criminal law to a variable extent, according to the measure of the grants of Regality or Barony; so that an apparent paradox has a certain amount of truth, that Scotland never possessed one law until it had ceased to be an independent State. The military or proper feudal tenure of wardholding was converted into blench if held of the Crown, or feu if held of a subject, but a simulacrum of the feudal system was retained in Scottish conveyancing, which was long cherished by our lawyers with a tenacity almost equal to that of the feudalists of the middle ages. It was indeed not uncommon within recent memory to hear a Scottish lawyer spoken of as a distinguished feudalist, as in England

the devotees of the old common law were known as black-letter lawyers. With the exception of the Heritable Jurisdictions Act very few statutory changes were made in Scottish law during this period. Parliament, much occupied with foreign affairs, was still reluctant to engage in internal legislation, and Scottish law was regarded by it as a *terra incognita* into which it was dangerous to travel.

There were, however, a few urgent reforms. The last vestiges of serfdom, which had silently vanished from the law of England since the time of Elizabeth, were abolished in Scotland by the Acts which freed colliers and salters from astringent to their masters.¹ The fetters of the Scottish entail were relaxed by the Montgomery Act,² though with a timid hand, so as to allow the heir in possession, as the owner for the time was called by an anomalous but not inaccurate phrase, to improve the estate. Promissory notes were admitted to the privileges of bills.³

The absence of new legislation left a large amount of independent power in moulding the law to the judges of the Scottish Supreme Court. They unfortunately devoted themselves by preference to the development of a highly-complex system of feudal conveyancing, to the comparative neglect of mercantile jurisprudence, which their countryman Mansfield was about the same time, aided by the practical knowledge of mercantile juries, building on the foundations of the ancient common law of England into a singularly complete system, for the purposes of the race into whose hands was gradually coming a great part of the commerce of the world. But the decisions of the Scottish Courts, though they cannot fairly be compared with those of the best English common law or equity judges in their special departments, were such as no Scotchman need be ashamed of; and in one branch—that of international law—an absence of the insular prejudices of the English Bench and Bar preserved it from falling out of harmony with the principles established by the jurists of the Continent, who were learned in the law of nations.

The Court of Session, under the presidency of Forbes of Cullo-den, the two Dundases of Arniston, and Craigie of Glendoick, who had many able coadjutors, of whom Kames and Hailes, Monboddie and Braxfield, are the best known names, was the most powerful agent in the progress of Scottish jurisprudence. Their effect is seen in the *Principles of Erskine*, published in 1754, and his *Institutes*, published after his death in 1768.

These works exhibit the law in a form very materially altered from its condition as described at the close of the last century by Stair. The ingenious *Elucidations* and other writings of Lord Kames also belong to the same period, and represent its more speculative tendencies, which renders them, though very instructive to the historical student, less safe guides to the practitioner.

¹ 15 Geo. III. c. 28; 39 Geo. III. c. 56.

² 12 Geo. III. c. 72; 23 Geo. III. c. 18.

³ 10 Geo. III. c. 51.

It was during this time that Scotland and Edinburgh gained a peculiar and honourable place in the literature of Britain, which they never possessed in the same degree either before or since. The Scottish poets of the fifteenth and sixteenth centuries and the Scottish historians of the sixteenth and seventeenth had indeed earned a high reputation. But at no previous period had so large a number of good thinkers and good writers in their respective departments flourished together and encouraged each other towards a high standard of excellence by example and social intercourse. A certain simplicity in the style of living and absence of luxury probably aided in producing, as in the small towns of Germany, a healthy tone of thought. The influence of the leaders of literature reacted upon the leading lawyers, who were their associates and correspondents, and had a beneficial influence on the style of the judgments of the Courts and the treatises of legal authors. A taste for and active participation in letters and philosophy was not deemed incompatible with legal practice, and the Court of Session acquired a character and fame which was continued in the next generation, and from which it still derives some reflected light. The rusticity of the older Scottish law gave place to a greater elegance, fortunately without losing its original grasp of principles and their application to the business of life.

The works of Kames the philosophical, and Hailes the historical lawyer, illustrate this characteristic phase of Scottish law, which will always be amongst its honourable traditions. The correspondence of Kames with Lord Hardwicke on the abolition of entails and the advantages of the combination of law and equity in a single Court, show him to have been at least the equal of the most classical of the English Chancellors as a jurist. The union of law and equity was a fortunate peculiarity of Scottish as contrasted with English jurisprudence, and made, so long as the English separation of the two jurisdictions continued, any complete assimilation of the two systems impossible except as a retrograde step. That obstacle has at last in our own time been removed by the British Parliament attempting to fuse the legal and equitable jurisdictions in England; but the attempt, owing to the inveterate habits and prejudices of the English Courts, will yet require a considerable time for its complete accomplishment.

VI. The next fifty years of this retrospect (1782-1832) extends from the French Revolution to the first reform of the British Parliament. Its commencement witnessed the panic to which the governing powers both in England and Scotland yielded through fear of the contagion of revolutionary principles. The mode by which they repressed them is recorded in the last of the black volumes of the too often iniquitous proceedings which go by the name of State Trials. The genius in advocacy of a brilliant Scotchman, Erskine, seized the opportunity to strike the deathblow of judicial injustice in the Criminal Courts by appealing to the imme-

morial principles of the Constitution in a series of speeches which not merely convinced juries but educated the nation in the knowledge of their liberties and their necessary safeguards.

At the close of this period a more reasonable panic, caused by the possibility of an English revolution if the necessary but long-delayed reforms in the central power of the State were refused, was dissipated by a wiser statesmanship giving effect to the national will.

In Scotland parliamentary reform was more urgently needed even than in England, for Scotland had scarcely possessed a virtual, and still less a real, representation in Parliament. Nor had the Union remedied—it had rather emphasized—this constitutional defect. The necessary Acts for this purpose were now passed; but constitutional changes have been touched on in the present sketch only so far as necessary to mark the periods in our legal history, or to elucidate the causes which operated on the progress of our jurisprudence.

It had been found more easy to apply the reforming tendencies of the age to the constitution of the Scottish judicature than of the British Parliament, and in the beginning of the present century, many years before the Reform Acts, Lord Grenville, during the administration of Fox, carried a series of resolutions in the House of Lords which laid the train for a series of statutory changes in the form, jurisdiction, and procedure of the Court of Session. These changes, although they appeared to a majority of Scottish lawyers of that time almost revolutionary, are now admitted to have been for the most part valuable improvements.

The Inner House of fifteen judges, more like a committee than a grave judicial tribunal, in which such things had been possible as judges talking at each other and a judge sitting at the clerk's table instead of on the Bench because he would not associate with his brethren, was split into two Divisions of equal numbers and co-ordinate authority.

Permanent Lords Ordinary were introduced for deciding cases in the first instance, and the total number of judges was reduced by statute to thirteen.

The separate jurisdiction of the Exchequer and the Admiralty in maritime causes relating to civil rights were united with that of the Court of Session, to which was also transferred the consistorial jurisdiction in the first instance of certain Sheriffs who had succeeded the old Commissaries.

While these were beneficial alterations, the same cannot be said in the light of experience for the introduction of jury trial in civil causes at first before a separate Jury Court, created, there was grave reason to suspect, for purposes of party patronage, which after a trial of fifteen years was merged in the Court of Session.

The experiment of civil jury trial, unpopular in its origin and not conducted in a manner to remove prejudices by either the judges or the advocates, has never had a really fair trial in Scot-

land; but its restriction in England to a limited class of cases, which now appears to be imminent, forbids the opinion that the contrivances by which the Legislature and the judges, counsel, agents, and parties have combined to keep it within the narrowest bounds in Scotland were uncalled for. It was specially unfortunate that few opportunities were given for testing its value in mercantile causes at circuits in the chief commercial centres where it had proved useful and popular in England.

Another part of the same chapter of Scottish legislation cannot receive unmixed approval. The recent reforms in procedure have been in considerable part directed to the alteration of the practice which the Judicature Act as administered by the judges introduced. Still, if the absolute finality of the closed record and the almost universal use of proof by commission must be reckoned mistakes which occasioned constant practical inconvenience and expense, and occasional injustice to suitors, the abolition of written pleadings, formerly used in all cases of difficulty, and the consolidation of the Procedure Acts were beneficial.

Besides these alterations in the form and procedure of the Court there was a good deal of legislation affecting Scotland during this period, but it related chiefly to the administrative branches of law, which must always be chiefly statutory, and did not touch the substance of the common law. Such, for example, were the Lunacy Act,¹ the General Turnpike Act,² the Public-Houses Act,³ and the Weights and Measures Act.⁴ The Aberdeen Act,⁵ which redressed to some extent the inequality of the strict entail towards widows and younger children, the Thelusson Act against accumulation for the benefit of distant and unknown heirs,⁶ the Act relative to illusory appointments under powers,⁷ and the Truck Act⁸ against payment of wages otherwise than by coin, are perhaps the only statutes of much importance which belong to the domain of private law.

During the first half of this half-century the Bench, under the presidency of Ilay Campbell and Blair, maintained its reputation; but after the death of Blair it was overmatched by the talents of a Bar which again combined literary and political with purely legal ability. This was the time of the rise of the Whig advocates, whose characters have been so well portrayed by Cockburn, their most genial representative, while their Tory brethren, if they did not attain the same legal eminence or political popularity, might claim undoubted superiority in the works of genius of Scott, Wilson, and Lockhart.

The treatises of Mr. George Joseph Bell, like Erskine, Professor of Scots Law in the University of Edinburgh, are the record of the state of Scottish jurisprudence during this period, and in their successive editions, by various editors, bring it down to our own time. The first edition of the Commentaries was published in

¹ 55 Geo. III. c. 69.

² 1 and 2 Will. IV. c. 43.

³ 9 Geo. IV. c. 58.

⁴ 5 Geo. IV. c. 74; 6 Geo. IV. c. 12.

⁵ 5 Geo. IV. c. 87.

⁶ 39 and 40 Geo. III. c. 98. ⁷ 1 Will. IV. c. 46. ⁸ 1 and 2 Will. IV. c. 37.

1810, and the fifth—the last which he himself edited—in 1826. The Principles, an expansion of the Outlines of his Lectures, was published in 1829. These are the first Scottish law-books (if Bankton be excepted) which make copious avowed and exact use of English authorities. Mr. Bell, indeed, declares one of his objects in the Commentaries to be to introduce the lawyers of England and Scotland to a more intimate knowledge of the contrasted excellences of their respective systems of jurisprudence. Though that work has been occasionally cited, and always with respect, in English and American Courts, the general result of his labours in this direction has undoubtedly been to infuse a large portion of English mercantile law into our native system. Since its publication the citation of English authorities in this branch of jurisprudence has become more and more frequent in the Scottish Courts.

Mr. Bell remarks that in the time of Erskine the commerce of Scotland, which had begun to make rapid progress in the end of the seventeenth and beginning of the eighteenth centuries, had been checked by the failure of the Darien Scheme and the two Jacobite rebellions, so that there is very little to be found in his Institutes concerning commercial law; and the valuable learning concerning contracts and the principles of mercantile jurisprudence in general to be found in Stair, shrinks in Erskine's work into a very narrow compass. His own Commentaries were designed to supply, and to a large extent succeeded in supplying, this defect. But it must be regarded as unfortunate that this valuable treatise was not written in the form of Institutions, in which the whole body of the law is philosophically arranged, but of Commentaries on the two contrasted relations of solvency and insolvency, the latter, as the more complex, receiving the greater share of his attention. As a consequence, when in the later editions the work was gradually enlarged so as to cover nearly the whole field of civil law, its arrangement is by no means so natural or lucid as in the works of Erskine and of Stair. The arrangement of the elder lawyer, who was, with the exception of Bacon, the most philosophical mind which has been ever engaged on British law, which is based on the division of rights as the proper ultimate subject of law, appears to be the true principle of division of the Corpus Juris, and superior alike to the old Roman division and to that of the English law introduced by Hale and Blackstone. The new relations and consequent new rights emerging in cases of insolvency and bankruptcy are however so numerous that it is an undoubted advantage to have a work which treats them in detail. The growth of the modern Scottish bankruptcy law, commencing with the statute of 1772 and practically ending with that of 1856, a system not free from imperfections, but preferable to that of England, is in large measure due to the learning and legal genius of Mr. Bell. It is a remarkable proof of the independence and native vigour of Scottish jurisprudence in the hands of competent Scottish

lawyers even after the connection with England had lasted so long as to make such independent progress unlikely.

VII. The last half-century of our legal history reaches from the passing of the Reform Act to the present year (1832-82). Now that the British Parliament had commenced the work of legal reform in earnest, and had itself become a more powerful because a more truly representative institution, it was not to be anticipated that Scottish law would remain, as it had done down to 1832, substantially unchanged.

The great improvements in locomotion, due to the invention of the steam-engine, and in business communication, due to the invention of the telegraph, increased postal facilities, and the cheapening of newspapers, brought England and Scotland into a direct contact with each other in a manner which was impossible in the last century. Law, which is the expression of the whole conditions of social and business life in their relation to justice, could not resist the influence of the scientific revolution of the nineteenth century and its practical effects any more than it could resist the earlier political revolutions. The consequence has been that Scottish jurisprudence, which could no longer be developed at a sufficient speed by the slow action of the decisions of the Courts, has been the subject of an ever-increasing flood of legislative change.

Would that the progress in the art of legislation had been commensurate with that in the other arts, and directed by the same scientific spirit!

Unfortunately the knowledge and wisdom of our legislators have not kept pace with their feverish zeal. The conditions upon which parliamentary law-making is carried on amidst a crowd of other pressing business—by talk rather than by thought; the frequent changes of governments and officials; the extravagant economy which prevents the efficient drafting of statutes; the ignorance of the law on the part of many members of Parliament who fancy themselves capable lawmakers, have combined to produce a result which might allow a cynic to maintain that Scottish jurisprudence has been injured in substance as it undoubtedly has been in symmetry, instead of being improved, by the statutes of this period.

This would not be a fair judgment; but undoubtedly some change must be made in the methods of legislation and in the sphere and conduct of parliamentary business, and greater care must be taken in the selection of legislators if our law is to become worthy of comparison with the old Roman or the best modern Continental codes.

It is a pitiable spectacle when laws succeed each other (to use words of a German poet) like a hereditary and perpetual disease. Three Apportionment Acts,¹ nine Entail Acts,² and a great variety

¹ Geo. II. c. 19; 4 and 5 Will. IV. c. 22; 33 and 34 Vict. c. 35.

² 2 Vict. c. 70; 3 and 4 Vict. c. 48; 4 and 5 Vict. c. 24; 7 and 8

14; 11 and 12 Vict. c. 36; 16 and 17 Vict. c. 94; 23 and 24 Vict. c. 95;

³ 2 Vict. c. 84; 38 and 39 Vict. c. 61.

of Acts¹ altering the form and effect of conveyances during the present reign are symptoms of this disease. The doubt which has frequently occurred, whether a statute was intended to apply to Scotland, and the certainty that if it was, it was drawn by some one ignorant of Scottish law, shows neglect of the first elements of good legislation. Yet let not these remarks, in which it has been necessary to employ emphatic language and pregnant examples to show the extent of the evil, be supposed to indicate an opinion that the remedy has really been worse than the disease. The statutes of this time have for the most part been necessary, and in great measure salutary, changes. The fault has been in their being made piecemeal without sufficient or comprehensive foresight, and, with some signal exceptions, by persons ignorant of the law they wished to improve, or of the art of legislation they attempted to practise.

The statutes to which reference has been made are too numerous for detailed statement, but they may be summarily grouped under the following classes:—

1. The reform of the Courts was continued in the Court of Session Acts of 1850² and 1868,³ the Distribution of Business Act of 1857,⁴ the Exchequer Court Act of 1856,⁵ the Sheriff Court Acts of 1838, 1853, and 1876,⁶ and the Summary Procedure Acts of 1864, 1875, and 1881.⁷

2. Conveyancing reform has been commenced in the Heritable Securities Act⁸ and the Sasine Act of 1845,⁹ the Crown Charters Lands Transference and Heritable Securities Acts of 1847, consolidated in the Titles to Land Act of 1868,¹⁰ and the Conveyancing Act of 1874.¹¹

3. The first steps towards the abolition of entails have been taken in the Rutherfurd Act of 1848¹² and its successive supplements in 1853,¹³ 1868,¹⁴ and 1875.¹⁵

4. The law of moveable or personal succession has been altered by the Intestate Succession Act, which introduced the principle of representation in 1855,¹⁶ and the Act for Confirmation of Executors has simplified procedure in succession by will.¹⁷

5. The protection of the property of pupils and other persons incapable of managing their own affairs has been put on a better footing by the regulations of the Pupils Protection Act of 1849,¹⁸ and to a limited extent the earnings and property of married women have

¹ 10 and 11 Vict. c. 48, 49, 50; 17 and 18 Vict. c. 62; 21 and 22 Vict. c. 76; 23 and 24 Vict. c. 143; 25 and 26 Vict. c. 85; 31 and 32 Vict. c. 106; 32 and 33 Vict. c. 116; 37 and 38 Vict. c. 94.

² 13 and 14 Vict. c. 36.
³ 31 and 32 Vict. c. 100. ⁴ 20 and 21 Vict. c. 56. ⁵ 19 and 20 Vict. c. 56.

⁶ 1 and 2 Vict. c. 119; 16 and 17 Vict. c. 92; 39 and 40 Vict. c. 70.

⁷ 27 and 28 Vict. c. 53; 38 and 39 Vict. c. 62; 44 and 45 Vict. c. 33.

⁸ 8 and 9 Vict. c. 31. ⁹ 8 and 9 Vict. c. 35. ¹⁰ 31 and 32 Vict. c. 101.

¹¹ 37 and 38 Vict. c. 94. ¹² 11 and 12 Vict. c. 36. ¹³ 16 and 17 Vict. c. 94.

¹⁴ 31 and 32 Vict. c. 84. ¹⁵ 38 and 39 Vict. c. 61. ¹⁶ 18 and 19 Vict. c. 23.

¹⁷ 21 and 22 Vict. c. 56. ¹⁸ 12 and 13 Vict. c. 36.

been protected from the grasp of husbands or their creditors by the Conjugal Rights Act of 1861.¹

6. Some partial steps towards the assimilation of Scottish and English mercantile law have been made in the Mercantile Law Amendment Act of 1856.²

7. The law of evidence has been improved on the principles which Bentham established by the Acts of 1840,³ 1852,⁴ 1853,⁵ and 1874,⁶ which have abolished most of the grounds which excluded witnesses and prevented the discovery of the truth of transactions under the older Scottish law.

8. The law of bankruptcy and execution has been placed on a more equitable basis by the Personal Diligence⁷ and Cessio Acts,⁸ the Bankruptcy Acts of 1856⁹ and 1860,¹⁰ the Judgments Extension Act of 1868,¹¹ and the recent Debtors Act of 1881.¹²

9. The series of Clauses Acts of 1845,¹³ carried simultaneously for England and Scotland, have introduced new machinery for the compulsory taking of land, and along with the series of Companies Acts, have provided general rules for the management of railways and other companies.¹⁴

10. The administration of the Poor Law has been put on a new basis by the Act of 1845,¹⁵ that of lunatic asylums by a series of Acts,¹⁶ that of public education by the Universities Act of 1858,¹⁷ and by the Schools Act of 1872,¹⁸ and that of roads by the Act of 1878.¹⁹

11. A more regular system of registration for births, deaths, and marriages was introduced by the Act of 1854,²⁰ and of assessment under the Valuation Act of the same year²¹ and its supplements.²²

12. The health and good order of towns have been improved by the General Police and Improvement Acts of 1862²³ and 1868,²⁴ and the Public Health Act of 1867,²⁵ and an attempt has been made to secure rivers from pollution by the Act of 1876.²⁶

13. An important branch of the legal profession has been re-organized by the Law Agents Act of 1873.²⁷

This does not profess to be a complete enumeration even of the most important statutes, but the catalogue is long enough to show

¹ 24 and 25 Vict. c. 86. ² 19 and 20 Vict. c. 60. ³ 3 and 4 Vict. c. 59.

⁴ 15 and 16 Vict. c. 27. ⁵ 16 and 17 Vict. c. 20. ⁶ 37 and 38 Vict. c. 64.

⁷ 1 and 2 Vict. c. 114. ⁸ 6 and 7 Will. IV. c. 56. ⁹ 19 and 20 Vict. c. 79.

¹⁰ 23 and 24 Vict. c. 37. ¹¹ 31 and 32 Vict. c. 54. ¹² 44 and 45 Vict. c. 22.

¹³ 8 and 9 Vict. c. 17 (Companies); c. 19 (Lands); c. 33 (Railways).

¹⁴ Companies Act, 1862, 25 and 26 Vict. c. 89; 26 and 27 Vict. c. 118; 32 and 33 Vict. c. 48. ¹⁵ 8 and 9 Vict. c. 83.

¹⁶ 20 and 21 Vict. c. 7; 25 and 26 Vict. c. 54; 27 and 28 Vict. c. 59; 29 and 30 Vict. c. 51.

¹⁷ 21 and 22 Vict. c. 83. ¹⁸ 35 and 36 Vict. c. 62. ¹⁹ 41 and 42 Vict. c. 51.

²⁰ 17 and 18 Vict. c. 80. ²¹ 17 and 18 Vict. c. 91.

²² 20 and 21 Vict. c. 58; 24 and 25 Vict. c. 83; 30 and 31 Vict. c. 80; 31 and 32 Vict. c. 48.

²³ 25 and 26 Vict. c. 101.

²⁴ 31 and 32 Vict. c. 102.

²⁵ 30 and 31 Vict. c. 101. ²⁶ 39 and 40 Vict. c. 75. ²⁷ 36 and 37 Vict. c. 63.

how great has been the activity of Parliament in reference to Scottish law during the last fifty years. It may be doubted whether the law of any country has ever been in a like period subjected to an equal amount of partial legislative change of a kind which even its authors could scarcely expect to remain itself long unchanged.

Nor has the Court of Session during this period been idle, but both by Procedure Acts, and still more by silent changes in the practical conduct of suits, it has to a large extent seconded the efforts of the Legislature by abolishing technicalities in pleading and securing despatch of business. Its Procedure Rules, though comparatively simple and well adapted to its improved practice, which has gained for it an increased confidence and credit, have not yet been, as they easily might be, consolidated in a single Act, but have to be sought for in a great variety of isolated Acts of Sederunt.

The admission of a member of the Scottish Bar as a Life Peer to the House of Lords, where the adjudication of cases in several departments of Scottish law had been long felt to require such aid, is the only legal change which has been made in the judicial tribunals affecting Scotland, but what the effect of this change may be in the development of Scottish jurisprudence it is too soon to decide.

The Court of Session, on the other hand, has been injured by the unconstitutional action of governments belonging to both political parties, who, without altering the law, have several times kept the Court below the number of judges prescribed by statute, and afterwards filled the vacancies, not with the view primarily to strengthen the judicial body, but to suit the temporary exigencies of party.

If lawyers are sometimes justly accused of a professional bias against legal reforms and certainly require the supervision of statesmen, politicians and statesmen also require the supervision of lawyers to prevent them from exercising arbitrary power.

The character of legal literature in Scotland, as in England, has undergone during this period a change necessitated by the immense amount of new material it has had to digest, and treatises on special subjects, of which the works of Lord Fraser on the Personal and Domestic Relations, Lord Maclaren on Wills and Succession, and Sheriff Dickson on Evidence are examples, have taken the place of general treatises covering the whole law.

Such appear to be some of the leading points which meet our view when we trace the course of the history of the law of Scotland since its commencement as an independent system of jurisprudence down to the present day.

He would be an unwise prophet who attempted to foretell what the law of Scotland will be, and what the condition of the College of Justice, when an equal period has passed to that which this essay

has attempted to survey. But it would be a profitable task to endeavour to describe the possible reforms which under favourable auspices may be anticipated during the next half-century.

No law save the Divine can be eternal, but it is only by looking beyond the immediate present, by a study of the science of jurisprudence, the history of law, and the neglected art of legislation, that laws can be placed on a foundation which shall not be transitory, but possessed of such permanence as is granted to the works of man. The legislator and the reformer of law should have the spirit of the architect, who does not build for one but for many generations.

THE CIVIL IMPRISONMENT (SCOTLAND) BILL, 1882.

THE recent Act for the abolition, with certain specified exceptions, of imprisonment for civil debt in Scotland has been the subject of more than one article in this *Journal* (see especially vol. xxv. p. 377). The change in the law of personal diligence which that Act effected was a very great one, and the indirect effects of the loss of the power to subject a debtor who obstinately refused to pay his debt to the *squalor carceris*, have been, as we were assured at the time the change was made they would be, serious enough. Nobody can read the indignant letters which ever and anon appear in the newspapers from victimized traders or law agents who have failed to recover payment for their clients of debts which they believed the debtor was well able to pay if sufficient pressure could only be put upon him, without confessing to himself that the Act is not universally popular. We propose now to make one or two observations upon a Bill which is at present in Parliament, and has after being read a second time been sent to a Select Committee.

Dr. Cameron, the prime mover in the change effected in 1880, did not quite get his own way in the Act of that year, and he has brought forward a Bill still further "to amend the law relating to civil imprisonment in Scotland." He proposes to call it, when transformed into an Act, "The Civil Imprisonment (Scotland) Act, 1882," though indeed when that event comes about, people will probably think it a pity that such a formidable name should survive when the thing that it signifies is almost defunct.

It will be remembered that the Act of 1880 exempted from the general abolition of imprisonment for civil debt the cases of debtors in (1) taxes, fines, or penalties due to her Majesty, and rates and assessments lawfully imposed and to be imposed, and (2) in sums decerned for aliment. It also provided that no person should be imprisoned even in these cases for a longer period than twelve months. The chief object, we think, of the new Bill (a few remarks

will be hereafter made upon the less important alteration it pro-

poses in the law) is to allow the alimentary debtor the same exemption from the diligence of imprisonment as his *confrère* who fails to pay his grocer or his tailor. It proposes that "from and after the commencement of this Act no person shall be apprehended or imprisoned on account of his failure to pay any sum or sums decerned for aliment." Now in order to understand the true position in which the case of the imprisoned alimentary debtor still stands, it will be necessary to bear in mind the construction which the provisions of the Debtors Act just above quoted have received. We venture to think that most people would have said on a first reading of the provisions of the Act of 1880 which we have just quoted, that Dr. Cameron did right in believing, as he certainly did, that though a person might still be imprisoned for non-payment of a sum "decerned for aliment," he could not be kept longer than twelve months in prison under one decree. His eyes were opened, however, by the decision in the case of *Walker v. Bryce*, which we referred to last month (6th December 1881, 19 Scot. Law Rep. 188; *ante*, p. 185). A man had been decerned to pay aliment for his illegitimate child. The decree ordained him, in common form, to pay this aliment for a period of years, and it was duly extracted. He did not pay one penny, though he was believed to have the means of paying, and he was incarcerated in the civil prison at the instance of the child's mother for non-payment of two quarters' aliment. While he was in prison aliment for his child was of course not forthcoming, and within a year of his first incarceration a new warrant of imprisonment, following on a charge to pay aliment for the period during which he had been in prison, was served upon him. After he had been in prison for a full year he demanded liberation on the ground that for the "sums decerned for aliment" he had been in prison for the full period of twelve months now allowed by law. The argument that the incarcerating creditor had exhausted the *compulsitor* with which the law favoured her above other creditors, and that she must thereafter depend upon the same remedies against such property as her debtor might acquire as other creditors had, seems at first sight almost irresistible. Indeed the Lord Ordinary was of opinion that the plain words of the statute required the prisoner's liberation. The First Division, however, recalled the interlocutor of the Lord Ordinary, and instructed his Lordship to refuse liberation, the ground of their decision being that each new term's aliment was a new debt on which twelve months' imprisonment might follow. "If a person who is liable to pay aliment for seven or ten years," said the Lord President, "is to be imprisoned for the first term, and after that is to be free from all claims upon him for aliment, the effect would be that the section about imprisonment for aliment would become nugatory altogether." With all respect we should say that the creditor in it had had at least an opportunity of putting the debtor to a test which another creditor might not employ, and had at least

as good a chance as an ordinary creditor of getting the money out of the debtor in future; but passing that by, we find that in the present Bill Dr. Cameron does want to make it nugatory by sweeping it away altogether. Imprisonment even for one year will cease if his Bill passes. We must confess that if imprisonment for ordinary debt was rightly abolished, we can see no reason why the creditor in an obligation for aliment ought to be entitled to imprison his debtor for a long term of years. The chief arguments for the abolition of imprisonment in the case of ordinary debts, indeed, are peculiarly applicable to the case of creditors in an obligation for aliment, the enormous majority of whom are the successful pursuers of actions of filiation. The governors of the chief prisons in Scotland, in their evidence before the Select Committee which dealt with the measure of 1880, gave it as their experience that the great majority of incarcerating creditors were actuated in having their debtors imprisoned by considerations of revenge, and it is beyond dispute that the greatest difficulty in defending the former law arose from the circumstance that it allowed the incarceration of one private individual, and (if the debtor could not bear even the trifling expense of a *cessio*) his liberation also, to depend on the will of another private individual, who might have, and often had, a spite against him. Nobody is more likely to have that feeling than the mother of an illegitimate child must have against the man who has first wronged her irretrievably and then left her to bear all the expense of her child's upbringing alone, and nobody therefore is less suited *prima facie* for having the power of imprisonment put into her hands.

An odd story of the revenge which a woman thus injured took on her debtor is told in the evidence of one of the witnesses before the Select Committee on the Bill of 1880. A girl to whom a man had broken his promise of marriage had obtained a decree against him for £25 damages and £10 of expenses, and in default of payment had had him incarcerated in the Debtors' Prison in Edinburgh. She was a poor seamstress in the Canongate of that city, but she kept her false lover pent in prison for two years and three months, during which time she made it her daily practice, according to the witness from whose evidence we are quoting, who was himself an imprisoned debtor, to show herself opposite the windows of the prison, and occasionally, as it seemed to those within, to express by gesture her triumph over him. This was not delicate, but it was natural enough, and was better than the more literally vitriolic treatment this Lothario might have received had he thus jilted one of our "lively neighbours." It was certainly more expensive for the lady, who, it seems, as a result of our prosaic practice, had to aliment her prisoner to the amount of £41.

Again, there is another consideration which was pressed on the Legislature by the advocates of the recent change in the law, and which obviously applies with special force to the creditor in an alimentary obligation. "To put your debtor in

prison," it was said, "is throwing good money after bad; you have then to aliment him." The application of this objection to imprisonment by a creditor who has had to establish his own poverty and inability to work in order to constitute the debt is ludicrously simple. Not much less so is the case of the poor woman who incarcerates the debtor to force him to aliment his illegitimate child. She has sued him because she is not bound to bear the whole burden of her child's support alone; indeed in almost every case she could not do it if she were. The result of the imprisonment is in most cases that she has to support the child and also to support in idleness the man who was bound to contribute to the heavy obligation she has in any event to bear.

A third main objection to imprisonment for debt was that it worked injustice to the friends of the person threatened with that ultimate diligence by extorting from their pity what the debtor could not pay. While we doubt much whether that consideration is quite legitimate, and doubt also whether the same objection is not equally capable of being stated against the diligence of pouncing and sale of goods which breaks up the debtor's home and sends him adrift upon the world, we need only here say that this objection applies to the alimentary debtor as much as to any other.

There is thus, we think, a good case in logic for the change proposed. If we are satisfied that we have done right in the past, we may without fear of inconsistency make this change also. The chief difference in favour of the abolition of the power in the case of ordinary debtors, and its retention in the case of alimentary debtors, was that by the old practice a system of credit was needlessly encouraged. But have we been right? And will the change be expedient? We confess that we are constrained to answer both questions in the negative. Let any one consider what the effect would have been if it had been decided in the case of *Walker*, as the argument for him practically involves, that if a debtor had the courage to endure one year's imprisonment for the first half-year's aliment, he was free of the diligence of the imprisonment for all the remaining years. To judges who know the ease with which a debtor can frustrate the diligence of arrestment of wages by having his wages paid daily, and how hopeless every diligence against property is against a young unmarried man with no house or stock-in-trade of his own, the argument must be always vain that the mother of his illegitimate child can arrest his wages or pounce his goods. She will not easily get any one to make the attempt who knows the insuperable difficulty which bars the way.

But, say the promoters of the new Bill, we do not mean to let this man go scot-free. Let the child become chargeable to the parish, and the inspector of poor will quickly prosecute the father as a rogue and vagabond. But will the first step in this proceeding be ever taken? Will the child become chargeable to the parish? It is a question depending on the ability of the applicant

in each case whether a woman having a child or children, legitimate or bastard, is entitled to relief for herself and them, she being the pauper and not they; and if she be a healthy young woman with one child, we are much mistaken if the inspector of poor will give her any relief. So far, then, as he is concerned, the defaulting parent will in most cases go free. Is it proposed to change this state of the law, and to throw upon the parish the duty of maintaining the mother and child, and then of prosecuting the father for the aliment thus expended, that is, of recovering the debt which he owes to the mother, by a process expensive, uncertain, and eminently unjust to the ratepayers of the parish? Unless Dr. Cameron and his friends will face that charge, unless they will have the inspector instructed to pauperize the mother, who herself is bound to pay one-half of the aliment, for the sake of exacting the other half from the father, the remedy they point to as a substitute for the *compulsitor* of imprisonment is no remedy at all. If any such substitute is to be proposed, it must be made criminal *per se*, and without reference to chargeability to the rates, for a parent to neglect to maintain his illegitimate child.

But are the cases under the present law so hard that this change must be made? Is it so difficult at present for a debtor in an alimentary obligation to regain his liberty? It must be remembered that the case of these debtors has long been distinguished from that of the ordinary debtor in this respect, that he, unlike them, could not get the benefit of a process of *cessio bonorum* without finding caution for the future payment of his debt. Let us see, then, how the facts stand—keeping in view this additional burden on the alimentary debtor—as to one of the cases which Dr. Cameron, in moving the second reading of his Bill, spoke of as a case of unusual hardship. We refer to the case of *Walker* already cited, in which the Lord President thus concluded his opinion: “The remedy for the prisoner, if he is an honest debtor, is to sue out a *cessio*.” *Walker* followed this advice, and it is upon his failure to obtain the benefit of the remedy there pointed out that the hon. member founded much of his argument in support of an alteration of the law. “*Walker* offered to pay one-sixth of his wages if he were let out. The Sheriff said he must give security for that, and let him out for a fortnight to look for security. He could not get it, and went back to prison” (Report of Dr. Cameron’s speech in *Scotsman*, 30th March 1882).

We have made ourselves acquainted with the facts of this case, and think they may perhaps interest our readers. *Walker*, whose creditors were the girl Bryce above mentioned, and another girl named Hill, who had borne him a child eight years before, but had never received one farthing of aliment for it from him, obtained *interim* liberation pending process of *cessio* on caution of £21 for his attending future diets, and returning to prison if *cessio* should be refused. He has been at work at his trade as a miner almost

ever since. He appeared to be examined in his process of *cessio*, and deposed that he could earn when at work 28s. or 29s. a week, and that he had never paid a penny to either of the mothers of his children. He offered to pay them in future one-sixth of his earnings, and the agents for the creditors expressed their willingness to accept any reasonable security that this offer would be implemented. Walker never made any offer whatever of such security, and the Sheriff-Substitute, from whose observations on the case we have extracted these particulars, refused the *cessio in hoc statu*. As was afterwards remarked by the Sheriff in adhering to his Substitute's decision, "What reliance can be placed on the simple promise of such a man, unsupported by any kind of security whatever?" We confess to thinking with the Sheriffs, that a man who could earn nearly 30s. a week, and could find abundant caution when his own liberation was his object, might have made some reasonable offer of caution for a payment of less than 5s. per week. As matters stand, however, Walker (though, we understand, not yet reapprehended) may be incarcerated again at the instance of his creditors, and can pose as a martyr to the savage character of the existing law.

But if, as appears to us, the power of imprisonment is the sole way open to the creditor of enforcing payment from men who can but will not pay their debts; and if, as we have freely admitted, the present law is unsatisfactory by being either unduly lax to one debtor or unduly severe to another, the question comes to be, In which direction shall we go? For ourselves we would venture to put that question in this form, Is it too late to go back? The mercantile community, especially the smaller traders, are deeply interested in this question. They have seen the *compulsitor*, of which they knew the value, taken from them in deference to arguments of which we have given, we think, a fair summary in an earlier part of this paper. It is idle to tell them that putting a man in prison seldom exacted payment from him. They knew well that the answer to that argument was, that even assuming that payment was seldom thus operated (and on that head the evidence of persons of experience will be found conflicting enough), the power of imprisonment made many a debt payable which would otherwise have had to be reckoned wholly bad. Nor could this power be easily abused. The honest debtor could always procure a *cessio* and demand his liberation on showing that he had made a complete surrender of his funds. The Chancery prisoner whom Mr. Pickwick met in the Fleet had no counterpart in the Scottish debtors' prison. Against the admirable and humane machinery for testing the ability and willingness of a debtor to pay, we think that but one fault—no doubt a serious one—was stated to the Select Committee on the Bill of 1880. There was some evidence before that Committee that the very poor debtor, the man who could not even raise the sum required

for advertising the dependence of the process in the *Gazette* and for paying the fees of Court, was practically debarred from even that *miserabile remedium*. Without committing ourselves to an opinion whether that serious blot upon the system was absolutely proved to exist, we think it obvious enough that if it did, it could be very easily removed. There would then have remained a process which, while it would have given the debtor all reasonable security against cruel and purposeless imprisonment, would have exacted from him on the other hand that full surrender of his estate which he was bound to make. There are indications from day to day that the public are not satisfied with the change that has already been made, which give us at least room to believe that the further development of it will meet with an active resistance.

When Dr. Cameron comes to that section of his Bill which deals with the other excepted case to the rule that there shall be no imprisonment for civil debt—the rates and taxes due to her Majesty—he is careful to provide that while imprisonment is not to be altogether abolished, the modified power of inflicting it which he is willing to leave shall not be subject to the construction which the *proviso* against more than twelve months' imprisonment received in the case of *Walker v. Bryce* from the opinions of the judges, in which it is plain enough that the same rule is applicable under the former Act to the man who is in arrear with taxes as to the man who does not pay his term's aliment. It is now proposed that without prejudice to "civil rights and remedies," four weeks' imprisonment "in all" may be inflicted as a test of the debtor's willingness and ability to pay the taxes of any one year. Experience has already proved that this modified form of imprisonment for debt would be unavailing in recovering alimentary debts.

We have left ourselves little room to speak of the other proposals of the new measure. With the exception—important to any debtor who may be left in prison unrelieved by the Act—that the rate of aliment shall never be less than 1s. per day, the proposals of the Bill of which notice need be taken are two—

1. That "no one shall be imprisoned for failure to find caution in a process of lawburrows." This anomalous old process, which has been in *invidi observantia* for more than 430 years, thus bids fair to receive its deathblow from the Legislature after having for more than a generation bidden defiance to the blows dealt to it from the judicial Bench. Indeed any one who will look at the last-reported case of much importance on the subject will see that it had even begun again to have a little of that judicial favour of which it had been lacking since nearly thirty years ago Lord Cockburn called the bond of lawburrows "an absurd form in reference to modern customs." The process dates from an Act of 1449, c. 13, which provides, "Gif ony person dreads ane uther, that he passe to the Schireffe or to the officiares that it effeiris to, and make that knawin or swear that he dreads him, and they sall

take borrowes of peace after the acts maid thereupon of before;" but the taking of "souertie" of this kind against "deed or mannanee or violent presumption" had been provided for the Parliament of Scotland by a previous Act of 1429. The surety taken is just surety that the party will keep the law. "For the uptaking of all," says Lord Stair, "it must be considered what lawborrowes are, which the word itself insinuates to be caution found to do nothing but by order of law, for a 'burrow' or 'burgh' in our ancient language is a cautioner, and lawborrowes is 'caution' to keep the law." The good people of Aberdeen would be amused to find on referring to the decisions of the Supreme Court for the year 1549 that the authorities of the Auld Toun of Aberdeen, between which and New Aberdeen there seems to have been then a little of the jealousy that is said to exist to this day, found it desirable to make use of this remedy against the "Provost, Bailies, Council, merchants, and craftsmen" of the upstart "New Town."

Notwithstanding the extremely innocent nature of the process, as Lord Stair represents it, experience has proved that it is a process which may be very harshly used for mere purposes of annoyance or getting rid of a troublesome enemy, who first hears of the application for lawburrows when he receives a charge to find caution within a short period, and learns from it that his adversary has made oath before a messenger-at-arms that he apprehends bodily injury at his hands. If caution be not found the person against whom complaint is made is pretty certain to be incarcerated in a debtors' prison till he find it, and for him of course there is no process of *cessio* to lead to his release. It seems to us, notwithstanding the facts disclosed in the case of *Brock v. Rankine* (1. R. 991), which led Lord Deas to say a word in deprecation of any rash abolition of this anomalous law, that a process of this kind is so much out of harmony with the social state of this country in our time that the most conservative of lawyers would hardly regret its disappearance.

2. The Debtors Act of 1880 made no change in the law of civil imprisonment under decrees or obligations *ad factum præstandum*. The new Bill proposes to deal with the case of the man who, having been ordained by decree of a Court to sign a deed or document within a certain time, shall not at the end of that period have obtempered the decree of Court. "Unto this last" the Bill proposes to mete out the same treatment as to others, that is, to give him no imprisonment at all. The Bill proposes, "in order still farther to diminish the number of cases in which any person shall be liable to be apprehended or imprisoned on account of any civil debt, claim, or demand," that in such a case "the Court may grant warrant to the clerk of Court to sign such deed or document, which warrant shall be indorsed thereon, and the deed or document when signed by the clerk shall have effect to all intents and purposes, and shall be as binding, and if necessary may be recorded in any register, as if the deed or document had been signed by the

person named in the said order or decree." It is not provided in words that the person who has thus refused obedience to the Court is to be allowed to go free, but the ground of committal is effectually removed by allowing the act to be done by another which it was the object of imprisonment to force him to do. So far as the proposed change will save from hardship creditors and others in whose interest the signature of the deed or document is required it must have the approval of all. But will Dr. Cameron not allow the less tender-hearted among us to urge that the obstinate debtor with whom he would deal so mildly ought to have a period of imprisonment awarded him by the Court whose lawful order he has so stubbornly refused to obtemper? It has been well said of such an individual, that he "is neither entitled to the privilege of sanctuary, the benefit of aliment, nor of *cessio*, as he may be said to hold the keys of the prison in his own hands." His pitiful case is to be remedied, however, by the demolition of the prison itself.

ANOMALIES IN THE LAW OF BAIL.

THE rule laid down by the Act 1701, that "all crimes not inferring capital punishment shall be bailable," is now one of those obsolete enactments which has become inapplicable, in its literal sense, to modern practice, but which has been allowed to remain on the statute-book for want of a better criterion of judgment. We have now no crime but murder practically inferring capital punishment, though theoretically—and therefore to the effect of precluding bail, unless with consent of the Lord Advocate, or in the discretion of the Supreme Court—the list of capital crimes includes various aggravated thefts, besides the pleas of the Crown, and a few statutory offences; the pains of which are now always supposed to be restricted, by the humanity of the prosecutor, to an arbitrary punishment. The Commissioners on Capital Punishment, in their Report in 1866, strongly recommended that the anomaly of retaining such offences as capital should no longer be allowed to exist; but that recommendation, necessitating a new standard or classification of bailable crimes, has not been carried into effect. In view, however, of possible legislation on the subject, we venture shortly to point out some anomalies which exist under the present practice; and we hope they will be removed.

The most striking anomaly occurs in the unequal measure of justice dealt out to the thief and the resetter—relatively, generally, the poor thief and rich resetter—the one incurring risks of detection, which the other, who reaps the chief fruits of the crime, often

avoids, by reason of his superior position and advantages, to

We talk of the resetter being as bad as the thief—some-

times as worse than the thief—encouraging him in his evil ways by providing a ready market for the disposal of his plunder; but, in marked contrast to this, the law puts them upon a very different footing in its mode of dealing with them. Under our old practice, while the thief was hanged, the resetter was scourged and transported; and by our present practice the thief, in the case of a *furtum grave*, is denied bail, while the resetter is entitled to that privilege, no matter how numerous his acts of reset, or how great in value are the resetted goods; reset not being a crime inferring capital punishment. The result is that the rich resetter in serious cases is often unpunished, preferring, as he does, after liberation on bail, to avoid the risk of a trial by leaving the country. As an illustration a case in our experience may be cited—a case which produced a painful impression on our mind and shook the faith of the public in the impartial distribution of justice. A few years ago an extensive theft of jute was committed in Dundee by a carter who was employed to drive the material from vessels at the harbour to the mills of the owners in town. He was in league with the owner of a suburban mill, who agreed to purchase from him for a nominal sum any quantity of the jute that might be brought to his mill. The carter drove a considerable quantity of the stolen material to the resetter's premises to be worked up by him in his business. By an accident the criminal traffic was discovered, and both thief and resetter were apprehended and committed for trial—the carter on a charge of theft, and the mill-owner on one of reset. The carter had not been previously convicted, but the extent of his thefts amounted to a *furtum grave*, and he was refused bail under the Act. The resetter, however, was legally entitled to bail, and he had no difficulty in finding it to the amount of £300, that being the highest sum that could be exacted from him under the statute. On his liberation he sold his mill, and realized his other property; and before the diet of trial arrived had sailed for America, and was thus practically beyond reach of the law. The usual sentence of outlawry was harmlessly fulminated against him for non-appearance. His estates were declared forfeited to the Crown, but he had left nothing behind him which could be attached by the outlawry. Her Majesty's Exchequer was enriched by forfeiture of the £300, but this was a poor set-off against the defeat of justice which the unequal operation of the law of bail unfortunately permitted. The carter was detained in prison, brought to trial, convicted, and sentenced to penal servitude.

Another anomaly is found in the contrast between theft and the cognate crime of breach of trust and embezzlement, the distinction between which crimes in many cases, as was lately remarked from the Bench, being more in words than in substance. A thief who makes a single furtive exploration of a gentleman's pocket, and by chance obtains a well-filled pocket-book or purse,

the value of which raises the crime to a *furtum grave*, is beyond the privilege of bail. But a confidential clerk, who during a period of years has systematically embezzled money intrusted to him by his master, and falsified his books to conceal his defalcations,—which may amount to thousands of pounds;—who, in other words, has added to what is essentially theft the guilt of breach of trust, is not treated as a thief, but is held guilty only of the lower offence of breach of trust and embezzlement, and therefore has the right to obtain liberation on bail on finding caution to an amount not exceeding £300. In such a case it is not surprising that the accused should avoid trial by allowing his bail-bond to be forfeited.

The defect of the Act is sometimes indeed overcome, in an indirect way, by the prosecutor committing the prisoner on facts which strictly amount to breach of trust and embezzlement only, under the alternative charge of theft, though on the trial that alternative charge is departed from or found irrelevant, or not proven. Sometimes the commitment is on the capital charge alone, while in the subsequent indictment the milder alternative is introduced, on which a plea or verdict is obtained. In the case of the City of Glasgow Bank directors the law of bail was found unequal to the occasion, except by resorting to a constructive and alternative charge of theft, based on the felonious conversion of a large number of bills of exchange intrusted to them for collection. This charge of theft was afterwards laid in the indictment alternatively to breach of trust and embezzlement, but the directors were found not guilty of either alternative, though the commitment as laid had the effect of preventing them obtaining bail, and of securing their attendance at the trial. So far as regarded the gigantic frauds against them, laid as such, the Court had no power to refuse bail, the highest sum which could have been exacted from such of them as were landed proprietors being £600, and from those who were simply householders or gentlemen £300; and had the charges in the commitment been limited to those which were proved on the trial, the accused would undoubtedly have been liberated on the above amounts, and most probably would not have appeared at trial.

Fraudulent bankruptcy, or putting away goods by insolvent debtors for the purpose of defrauding their creditors, is another of those crimes in which the accused frequently avoid trial by reason of the facilities under our present practice. Here is a common case: The fraudulent debtor, after clandestinely putting away his stock, absconds with as much ready money in his possession as he can raise, but he is pursued and brought back when he is about to embark for a foreign country. Being incarcerated and committed for trial, he applies for and is liberated on bail, depositing part of the money belonging to his creditors, if he fails to find a friend to become surety for him. The fact of his intention not to appear and stand trial, as shown by his previous flight, offers

no barrier to his liberation; his crime does not infer capital punishment, and the judge has no power to retard his flight. Upon his liberation he is allowed to do legally what he before attempted to do illegally; he leaves the country without further interruption from the officers of the law, carrying with him his ill-gotten gains, and the proceedings against him end abortively, to the disgust of his creditors, the dissatisfaction of the public, and the reproach of justice.

The above illustrations, we think, manifestly show that the criterion fixed by the Act 1701 is defective and inimical to justice, and also that the amounts exacted as bail are far too low. The Law Commissioners, in their fifth Report a few years ago, while stating their opinion that the statutory scale of bail was quite unsuitable, made no distinct suggestion as to altering the standard of bailable offences under the Act. But the witnesses examined before them, who had greatest experience in criminal matters, concurred in opinion that, regarding bailable offences, both the extent of bail to be required and the question whether, in the circumstances of the case, bail should be accepted or refused, ought to be left to the judgment of the committing Sheriff, with a power of appeal to the Court of Justiciary. It humbly appears to us that, in any new measure on the subject, while the pleas of the Crown might remain as at present, no hard and fast line need be drawn as to other crimes, but that a discretionary power, having due regard to the whole circumstances of each case, should be lodged with the Sheriff before whom the application for bail is made. We cannot conceive that such discretionary power should be so unwisely exercised as to place a resetter, or embezzler, or swindler in a better position than a thief.

The recommendation of the Law Commissioners, that such application should be immediately intimated to the Procurator-Fiscal, and that he should have the right to be heard with the other party, is very proper; as under present practice, from want of any such procedure, it sometimes happens that an accused person is liberated on insufficient bail, without the Fiscal's knowledge. The further recommendation of the Commissioners, that an appeal should be from the Sheriff to the Justiciary Court, seems right. The Commissioners appear mainly to have had in view an appeal as to the *amount* of bail only; but, in any such measure as we have indicated, the appeal would be not only as to the amount, but on the prior question whether bail should be granted. Such appeal, moreover, to be effective, should be open to the prosecutor as well as to the prisoner, the former having a substantial right to object if he had reason to believe the admission to bail would not secure the attendance of the accused at the trial.

The defects which we have pointed out are generally admitted; the remedy is simple; any measure towards that end is not likely to meet any opposition in Parliament, but would be welcomed by

all who wish our practice improved; and we hope our Lord Advocate may shortly be able to introduce and carry a measure dealing satisfactorily with the subject.

IMPROBATIVE BONDS OF CASH CREDIT.

"THE question," says Mr. Dickson, "is still open, whether a guarantee for advance by a bank to a merchant in the course of trade is valid if it is merely subscribed by the obligant, or whether it must bear the statutory solemnities." In other words, is such a writing *in re mercatoria*? There seems no good reason why it should not be so treated. No class of writings are more intimately connected with mercantile dealings. If we may argue from analogy, there are a number of decisions which would appear to decide this question in the affirmative. Thus in *Brebner* (January 18, 1803, 13 F. C. 168) a cautioner for a composition was held bound, although his letter was neither holograph nor tested. A similar result followed where the letter was a guarantee for the price of past and future furnishings among merchants (*Paterson*, January 31, 1810, 15 F. C. 545). In *Robertson & Co.* (December 11, 1821, 1 Sh. 221) an improbativ guarantee was granted to cover an advance of money. As Mr. Dickson points out, a banker is "merely a money merchant." The cases which throw most light upon the subject are *Thomson v. Gilkison* (March 1, 1831, 9 Sh. 520), *Ballantyne v. Carter* (January 21, 1812, 4 D. 419), and *Johnston v. Grant* (February 28, 1844, 6 D. 875). In *Gilkison's* case the document was in the following terms: "Sir, as treasurer appointed by the company of proprietors of the *Glasgow Free Press*, I hereby undertake to pay to you, for behoof of the Royal Bank, Glasgow, two hundred pounds sterling, as a debt due to you by Mr. William S. Northhouse." This letter was written by Northhouse, the editor of the *Glasgow Free Press*, and signed by Paterson, one of the proprietors. It was addressed to the agent of the Royal Bank. When he founded upon the letter in an action against the proprietors of the paper he was met with the following pleas: "The letter if considered as a guarantee, cannot be held to be *in re mercatoria*, so as to take it from under the provisions of the Act 1681; and if considered as constituting a primary obligation for payment of money, it is a promissory note, and null for want of a stamp, which cannot now be impressed on it." It was afterwards stamped as an obligation, and sustained by the Lord Ordinary as falling under the category of writings *in re mercatoria*. In the Inner House, Lord Glenlee, after pointing out that whether the document was to be considered as a letter of guarantee or an obligation, it was clearly not a promissory note requiring to be written on paper previously stamped,

remarked, "As to its being improbative, I remember a decision by the late Lord Newton, that an obligation for a debt already due could not be considered as *in re mercatoria*; but if the debt be of a mercantile character, I think that the obligation should also be considered as *in re mercatoria*." Lord Justice-Clerk Boyle said, "This is undoubtedly a letter of obligation, not a promissory note, and it falls under the class of documents *in re mercatoria*."

In *Ballantyne's* case the guarantee was not granted directly to a bank, but to the cautioner under a bond of cash credit. The latter was operated upon, and hence the plea that *rei interventus* had followed was set up. The Court gave effect to the plea, and the question of the value of an improbative document of this nature was not decided. The Lord Ordinary (Cockburn), however, asks, "Was not the letter in question granted *in re mercatoria*?" Lord Mackenzie said, "It is unnecessary to decide whether the letter was granted *in re mercatoria* or not. I agree on the grounds of the Lord Ordinary's judgment." Lord Gillies was "not prepared to say that this bond was granted *in re mercatoria*. Cash credit bonds are certainly often used for mercantile purposes, but they are not necessarily so." Lord Fullerton was doubtful whether the action could have been supported upon the plea that the letter was *in re mercatoria*. The Lord President also avoids the question. Thus one judge seems to commit himself to a view favourable to the validity of such documents, while four decline to give out anything like a certain sound upon the subject. But they were quite clear that no plea of informality could stand for a single moment against the cautioner, who had relied upon the guarantee. As far as he was concerned, the simple signature of the granter was quite sufficient. Lord Mackenzie said, "The cautioner continuing bound is the most substantial *rei interventus*; it is just as good as if he had renewed the cautionary obligation on any occasion when money was drawn."

In *Johnston's* case the order addressed to a banker was in these terms: "As you have this day advanced Mr. John Wink, Springfield, the sum of two hundred pounds, I hereby guarantee payment of the same to you within twenty days of this date." This case, originating in the Inferior Court, was advocated to the Court of Session, and two questions were raised, viz. whether this writing was *in re mercatoria*, and whether, should it be held not privileged and improbative, this defect was cured *rei interventus*. Lord Medwyn expressed a strong opinion in favour of the privileged character of such a document, founding on the cases of *Paterson* and of *Gilkison*. Referring to the former, he remarked, "It surely will not be said that this case is inapplicable to the present, because there it was a guarantee for furnishing of goods, and here for an advance of money. I never understood that the one was held privileged as *in re mercatoria*, while the other was not. On the contrary, I always understood that the rule was as applicable to

dealings of bankers as to merchants and shopkeepers, and just for the same reasons that apply to the latter for the facilities of commerce and to avoid the inconvenience that would attend transactions of frequent occurrence, and requiring expeditious performance, if regular writings, tested with all the statutory solemnities, were required." Lord Medwyn had been Ordinary in *Gilkison's* case. He looked upon *Ballantyne's* case as one which did not really raise the question, and peculiar in its circumstances, the writing not having been granted direct to the banker. He concurred with the other judges in holding that there had been *rei interventus*. Lord Cockburn did not dissent from the view expressed by Lord Medwyn regarding the character of the document, but he said, "I wish to rest my opinion upon the *rei interventus*, and not upon the *res mercatoria*, because the one point may perhaps be thought somewhat doubtful, and the other I consider as quite clear." He points out that there exists no definition of what are to be held as *res mercatoria*. Referring to *Erskine*, who mentions "sundry kinds of writings used among merchants and trading people in commercial affairs," he says, "If this be all that is required, I should think that a guarantee for an immediate advance of money by a bank ought to be held *res mercatoria*. . . . A bank is a money-shop. On principle, therefore, I see no distinction *quoad hoc* between a supply of cash by a banker and a supply of other goods by any other merchant." He thought, however, that the tendency of *Ballantyne's* case was to distinguish between surety for repayment of a loan, even where the loan is connected with a mercantile transaction, and ordinary mercantile dealings. And yet the doubt which prevented him from concurring with Lord Medwyn, he confessed, was very slight indeed.

Upon the other hand, Lord Moncreiff was very clearly of opinion that this was not a writ *in re mercatoria*, and with him the Lord Justice-Clerk concurred. "It seems to me," he said, "that this document, an obligation to a banker for money advanced, it is immaterial for what object, cannot be a writing *in re mercatoria*."

The effect of the decision in *Johnston's* case is really to render the question one of small practical importance. Even the Lord Justice-Clerk, while he viewed the document as one neither privileged nor probative, held it competent to prove that money was advanced on the faith of it, and that its terms may be read in order to see how the facts connect with its contents. The Court indeed went the length of holding that it was not necessary to aver that the advance had been made in the presence or with the knowledge of the granter. "I think," said Lord Moncreiff, "that we could not safely, nor in consistency with very many decisions, lay it down as an abstract rule of law that an improbative writing can never be rendered binding by *rei interventus* unless the act of intervention can be proved positively to have come at the time within the personal knowledge of the cautionary obligant. A man is barred

from pleading that such a document is improbable if he either knew of its having been relied upon, or from its having been only dealt with in the way he contemplated, must be held to have known that it would be so."

Correspondence.

(To the Editor of the "*Journal of Jurisprudence*.")

REGISTERED LEASEHOLD TITLES.

SIR,—It is well known, in districts where leasehold titles prevail, that the Registration of Leases Act of 1857, though often useful, has not attained its object in an exhaustive manner, and has also introduced several new disadvantages into leasehold conveyancing, including those attending the uncertainty as to the correct construction of several of its provisions. Its forms of writs are also somewhat unsatisfactory. Sufficient time having elapsed to test it in practice, its defects should now be remedied.

The object of the statute is to make it competent to substitute the more practicable or convenient process of registration of writs, in the place of possession of the subjects, as the badge of ownership, which shall be the condition of grants of leasehold rights being recognised as conferring real rights.

The scope of the statute has been much restricted in practice by the uncertainty whether a lease can be recorded for publication by an assignee whose title includes the succession of an heir without service, a state of title very common in the case of old leases, and which is often found to be practically irremediable. Either that circumstance should be expressly declared to be no objection to registration, or the process for procuring warrant of infeftment should be extended to leasehold titles; the first alternative being, I think, preferable for such titles.

Leases granted since the date of the Act cannot be recorded under it, unless the description in the lease of the subjects specifies certain particulars. Seeing that general descriptions of any kind in feudal titles may be made specific for all purposes by a mere ceremony, and that there is no reason for being stricter with leasehold titles than with feudal titles—precedent would rather indicate the reverse—a similar facility might well be made applicable to leasehold titles in such a case.

Registration of a lease for preservation after the date of the Act, a proceeding often desirable, also disqualifies the lease for subsequent registration for publication. The evident object of this restriction is to make it safe, or nearly so, to rely upon unregistered

titles, completed by possession, without searching the property records, by securing that there shall generally be written notice of the registration for publication on the body of the lease itself, or of the extract which is used with the title. This object has not been attained in a satisfactory manner, for the leases recorded for preservation before 1857, of which new extracts can at any time be procured not bearing any notice of registration for publication, are sufficiently numerous to afford an ample field for fraudulent dealing. If it be thought necessary to enable transactions with such leases to be safely effected without searches, this might really be done in an effectual manner, and at the same time the above very objectionable restriction might be removed, by permitting all extract leases to be recorded for publication, but requiring the Keeper of the Sasine Register to transmit to the Keeper of the Register for Preservation, a notice of the registration of every such extract, to be noted either upon the principal lease or on its record, either of which is accessible without tedious search. One special advantage of this plan would be that it could at once, and most easily, be applied to past registrations of extract leases. Some risk has been incurred, and is still being incurred, in practice, from the inefficacy of the statute to prevent frauds in dealing with properties held under such old registered leases, the usual and indeed unavoidable practice in districts where such leasehold titles prevail being not to search the property records. It would require no great adroitness for any dishonest person, finding himself in pecuniary difficulties, to raise considerably more than the value of such a leasehold property—which he might purchase for the purpose—by procuring two full loans from two busy conveyancers, one being procured on the faith of the apparent state of possession, and the other on the faith of the records, and separate extracts being procured for the two sets of titles. Such a fraud would not likely be discovered unless he were unable to extricate himself from his difficulties.

The statute has also introduced into leasehold conveyancing certain disadvantages previously foreign to that system. This appears to have arisen to some extent from a too close adherence to feudal precedents where these were objectionable. While a lease is unrecorded, an assignee who has a personal right to the lease under any form of title, including general as well as special conveyances, may convey the lease away from himself and from his predecessors without requiring to do anything of the nature of a ceremony to make his right real; and possession by his assignee completes at one step his own and his predecessors' titles. But whenever the lease is recorded for publication, this facility of a leasehold title is withdrawn, and the ceremonies imposed become, as the statute now stands, even less flexible than in proper feudal titles, especially since the recent conveyancing statutes have simplified the latter. There does not seem to be sufficient reason

for deviating so far from the precedents of leasehold conveyancing, as to take away this facility upon registration of the title, especially seeing that leasehold titles prevail mostly in rural districts, and the properties held by such titles are of far less average value than those held by feudal titles, and simplicity and economy are of more importance. A personal title upon which a public title can be expedite by the performance of a mere ceremony, not really of the nature of evidence, and which would then empower its holder to sell or convey, might most reasonably be allowed to be treated as a factory to sell or convey, by the party last publicly vested, independent of its more extensive effects; and the assignee uninfected might be allowed—as he would be with a leasehold title unrecorded—to convey away the subjects, not merely from himself, but from the person of the party last infected, as if he were a factor to sell or convey for the latter. That would remove one objection to registration of titles of small properties, which titles would in other respects be much simplified by registration. Such a course is not without precedents even in proper feudal conveyancing; for section 105 of the Bankruptcy Act of 1856 permits the trustee's act and warrant to be treated not only as a general conveyance, which is its main character, but also as a factory; and section 45 of the Conveyancing Act of 1874 seems even to go further than this, introducing apparently in certain cases a latent form of infection, which may, like other infections, be construed as conferring on the persons so infected, though not appearing on the register, public rights not merely concurrent with those of persons on the register, like factor's rights, but exclusive of those of persons on the register; unless, perhaps, reputed ownership may in special cases restrict the effect of this provision. The improvement I propose would be far more extensively beneficial than these enactments, and would apparently be free from the element of real danger involved in the latter enactment. It will probably be satisfactory to most persons disposed to advocate the cutting down of all ceremonies which are not really of the nature of evidence, to find there exist such precedents, adopted into such a strict system as feudal conveyancing, for what there might otherwise be a tendency to regard as an entire innovation in registered titles; though it may be doubted whether any such precedent should be regarded as a better argument than abstract principle, well considered; and though a precedent from feudal conveyancing will not now be allowed so much weight as in days when the feudal system, or its ritual, held full sway, and when there were lawyers and legislators seemingly possessed of such notions of its supposed perfection, or of its mystic claims upon their homage and support, that they were not only satisfied to forego practical convenience for its sake, but quietly permitted, year after year, to be sacrificed to it, Minotaur-like, interests and feelings having the highest claims upon their protection. To revert

to the details of the proposed improvement, the truth seems to be substantially this, that the right of an assignee under an unrecorded title, which if recorded would empower him to sell or convey, only differs from that of a factor for selling or conveying in being a more comprehensive right, including usually beneficial in addition to administrative rights, and the administrative rights conferred being of a more comprehensive and more permanent character than such a factor's rights; and the same principle upon which a person is allowed to use either of two double titles should permit the possessor of the greater right to exercise, at least, all the rights and facilities of the lesser; and probably, even in feudal conveyancing, such a reasonable facility to the holder of the more comprehensive title would not have come to be excluded in practice, had not the former prevailing inclination for complexity bent the ingenuity of conveyancers in an entirely different direction. A form of factory to sell or convey, in favour of the assignee and his successors, might probably be devised, and combined with the usual form of assignation, which factory, while not in reality conferring any additional right, would give to the assignee and his successors, though not publicly vested, the facility of conveying away the property from the party last publicly vested, as his factors, in accordance with the forms presently in use; but it would be more congenial to modern ideas and customs to attain such a result in a simple and logical manner by legislation, than thus to imitate the mediæval practice, exhibited in the old form of assignation, of causing the complete right of property, the meaning of which is really so simple, to masquerade in a dissected form; as if that were necessary to make its obvious qualities intelligible. It may be fancied by some conveyancers, long accustomed to the use of the notarial instrument as a preliminary to selling or conveying, that its omission would be inconvenient in practice, because its narrative, in its present shape, generally points out not merely the deeds founded upon, but also the active clauses of these deeds which are to be held applicable to the infestment; but it may well be doubted whether this is safe guidance, for it may divert the attention of an inexperienced conveyancer from the fact that, according to the existing practice, what is said in one clause of a deed may be unsaid or qualified in any other clause, and that no indications of this kind can enable him to simplify the question he must solve in investigating any title, namely, Does the title, read as a whole, confer the right in question? The most informal memoranda might supply better guidance, and be less likely to assume undue authority, than such a presumptuous-looking document as a notarial instrument. Perhaps, when titles are judicially founded on, an exact specification of the active clauses relied upon might in some cases be fair to the opposite party, to keep his objections within due limits, but this is an exceptional use of a title, and any additional specification might well be left to the Court to order to be put in process, as might

seem reasonable in each case without encumbering the title. If I thought I could prudently advocate the attaching of any other solemnities to such a personal title, as conditions of a public title being procured, the solemnities I would suggest would be such as would add useful evidence, and not merely ceremony, to the title; such, for example, as substantial evidence that particular properties have truly the characteristics which bring them within the scope of general conveyances; in the same way that when it is the party who is described generically he may have to prove his individual qualification by service as heir or by other procedure.

I now come to the forms of writs by which the objects of the statute are attained. The foregoing remarks show how disadvantages have arisen from imitating feudal procedure too closely; but in regard to forms of writs the mistake has to some extent lain in the opposite direction. After a lease has been recorded, why should writs relating to it differ in form from similar writs relating to a feu, unless perhaps that an option might be given, from the greater need for simplicity and economy, to dispense in leasehold titles with some of the formalities with which, from habit or other cause, feudal conveyancers might as yet be reluctant to part in their peculiar department. The present diversity of forms is often inconvenient, especially in cases where adjacent feudal and leasehold properties have to be conveyed together; and one of the results to which it has led has been to exclude leasehold properties and titles from the advantages conferred by recent conveyancing statutes, many of which would have been applicable and beneficial. There is no essential difference between feudal and leasehold rights except their usual duration, which is rather a difference of quantity than of quality; and which, in the case of building leases, will probably come to be extinguished by law, upon equitable compensation, on grounds of public policy, before the expiry of many of such leases. Indeed, perpetual leases seem already to be completely effectual if recorded under the Act. Feudal and leasehold rights are equally rights to the one side of bilateral contracts, notwithstanding the practice which has arisen, and which perhaps tends to obscure the analogy, of describing the subjects only in conveyances of the right arising under the feudal form of contract, but describing the contract itself in conveyances of the right arising under the leasehold form. Other differences can be referred to stipulations, express or implied, affecting the quantity rather than the quality of the rights conferred; and any privileges or restrictions implied under feudal or leasehold titles respectively can be altered by the express terms of the original contracts, so that the same kind of right, in all essential qualities, may be granted either by a feu or a lease. There is therefore so little difference between the two kinds of rights that all forms of writs competent in feudal conveyancing might be made competent in leasehold conveyancing, the description of the lease—which might

be made shortly by specifying its subjects, duration, and registration, so as to approximate as nearly as possible to the practice in describing a feu—being substituted for the description of the feudal subjects.

Other improvements might be suggested which would be worthy of consideration, but I think those above suggested are mostly such as will commend themselves generally to persons conversant with this peculiar department of conveyancing. SIMPLEX.

LAW GRADUATION.

SIR,—As it seems not altogether improbable that an Executive Commission may soon be appointed to deal with the Scottish Universities, and as the recommendations of the last Commission on the above subject were of a very unsatisfactory character, I would make an attempt to rouse the attention of the legal profession to the subject through the pages of your *Journal*. The recommendations of the Commissioners may be summed up in two sentences: (1) Institute another B.L. degree, and call it M.A. ! and (2) Lawyers as such have nothing to do with LL.D.!! In order to furnish a basis for consideration, I would suggest a complete scheme, in the hope that the principles involved may be accepted, subject to amendment in details. I shall first give the scheme, and then add a few words by way of vindication and explanation.

PROPOSED SCHEME.

1. Before entering the Faculty of Law, students shall pass the same preliminary examination as is required in the case of medical students. Greek and Ethics shall be essential for the degree of Doctor, but the examination on these subjects may be taken at any time before application is made for the degree. The examination in Greek shall always include one or more dialogues of Plato, and certain books of Aristotle, to be prescribed beforehand.

2. A graduate in Arts of any British University shall be exempt from all those examinations.

3. The course for the degree of LL.B. shall extend over four years, and shall include attendance on the following branches of Law for the period specified: (1) History; (2) Civil Law; (3) Conveyancing,—one course each of one hundred lectures. (4) Scots Law, two courses of one hundred lectures. (5) Procedure, Civil and Criminal; (6) Political Economy; (7) Medical Jurisprudence; (8) Toxicology; (9) Constitutional Law; (10) Public International Law; (11) Private International Law, along with English Law or Modern Roman Law, or French Law; (12) Jurisprudence and History of Law,—each one course of fifty lectures.

4. The qualifying course of Public Law and Constitutional Law shall be taken subsequently to that of History; and Medical Jurisprudence and Toxicology shall be taken in different sessions. For purposes of examination Nos. 1, 6, and 9, 4 and 5, 7 and 8, and 10, 11, and 12 shall count respectively as *one* subject; and a candidate may present himself for examination in

any two subjects at a time, provided always that no candidate, unless he is a graduate in Arts, as aforesaid, shall be taken for examination before the end of his second complete year. But such graduate shall be entitled to take the degree at the end of his third session of attendance.

5. In the examinations in Civil Law, International Law (Public and Private), and Constitutional Law, passages in Latin and French will be set for translation.

6. Candidates may take honours in any group of subjects by passing the Doctorate Examination (see below). Candidates who pass shall be arranged in three classes.

7. Any candidate may take the degree of Bachelor of Civil Law (B.C.L.) on substituting a distinct winter course of Moral Philosophy, and a second course of Civil Law and Constitutional Law, for Conveyancing, Procedure, Medical Jurisprudence, and Toxicology; and passing a further examination on these subjects.

8. After the expiry of eight years from the date of graduation, a Bachelor may proceed to the corresponding degree of Doctor (LL.D. or D.C.L.) on the following conditions:—

(1) He shall be at least thirty years of age (except as after mentioned).

(2) He shall produce a certificate from any of her Majesty's Judges, or any Sheriff or Sheriff-Substitute in Scotland, or the Dean or President of any incorporated legal body in Scotland, or any professor in a British or Colonial University, that he is personally known to the grantor, and has been engaged for at least three years since he obtained the degree of Bachelor, in the study or practice of law.

(3) He shall write a thesis on any subject falling within those prescribed for the Bachelorship, to be approved beforehand by the Professor of Law. This thesis may be dispensed with in any case where the candidate has published a meritorious work on a legal subject.

Or (4) He shall pass a searching examination on one of the following groups of subjects:—

(a) Law of Scotland, including Scots Law, Conveyancing, Procedure, and Medical Jurisprudence.

(b) Roman Law, including Civil and Public and Private International Law.

(c) Constitutional Law, including History, Constitutional Law, and Public International Law.

(d) Jurisprudence, including Moral Philosophy, Jurisprudence and History of Law, and Political Economy.

9. In the case of persons who are graduates in Arts as aforesaid, the degree of Doctor may be taken at the expiry of five years instead of eight, and the restriction of age shall not apply.

10. The degrees of LL.D. and D.C.L. shall still be conferred *honoris causa* on eminent statesmen, members of Parliament, and persons holding judicial positions, or promoting the improvement or study of Law; and they shall be distinguished as Honorary Doctors of Laws, or of Civil Law, as the case may be.

A few words of explanation. And first, the course above indicated is *shorter* than that presently prescribed for M.A., and considerably shorter than the medical course, while it is practically identical in length with the course for the ministry of the Church of Scotland and for the degree of B.D.

The classes may be arranged in the following manner:—

FOR FOUR YEARS' COURSE.

FIRST YEAR.

Winter.—History and Civil Law.

Summer.—Medical Jurisprudence and Civil Law (if there is a class in the University).

SECOND YEAR.

Winter.—Scots Law (junior) and Political Economy.

Summer.—Scots Law (if there is a class in the University), Constitutional Law.

In July or October pass in Civil and Constitutional Law.

THIRD YEAR.

Winter.—Scots Law (senior) or Conveyancing, Public International Law.

Summer.—Scots Law (if there is a class in the University, and that taken during winter), Toxicology and Procedure.

In July or October pass in Scots Law or Conveyancing and Medical Jurisprudence.

FOURTH YEAR.

Winter.—Conveyancing or Scots Law (senior), Jurisprudence, and Private International Law.

Summer.—Scots Law (if there is a class in the University, and that has been taken during winter).

In July or October pass in Conveyancing or Scots Law and Public Law, and Graduate.

FOR THREE YEARS' COURSE.

FIRST YEAR.

Winter.—History and Civil Law and Political Economy.

Summer.—Medical Jurisprudence, Civil Law, and Constitutional Law.

SECOND YEAR.

Winter.—Scots Law (junior), Political Economy (if not taken previously), Public International Law.

Summer.—Scots Law, Toxicology.

In July or October pass in Civil Law, Constitutional Law, and Medical Jurisprudence.

THIRD YEAR.

Winter.—Scots Law (senior), Conveyancing, Jurisprudence, and Private International Law.

Summer.—Scots Law and Procedure.

In July or October pass in Scots Law, Conveyancing, and Public Law, and Graduate.

Secondly, The course above indicated would be as good an *education* as the present course for M.A. Classics would be represented by Latin and French, and according to Professor Stubbs, in a more useful form than that in which they are at present given. Philosophy could be very efficiently taught *through* History, Political Economy, and Jurisprudence, and lastly, Science would be amply provided for in Medical Jurisprudence, and the Chemistry involved in Toxicology. Thirdly, The student's view of the scope of Law would be immensely extended, and yet the whole of the subjects above referred to could be overtaken by the present staff of Professors with very slight assistance and redistribution of work. Fourthly, The alternative presented by LL.B. and B.C.L. as above proposed would meet the difficulty which is felt with the present degree, and allow students who wished to study Law only theoretically to take as high a degree as those who intended to practise in chambers or at the Bar. It might attract men who were aiming at

service in the State or in Parliament. B.L. might still be retained with some modifications, such as abolishing Medical Jurisprudence as an alternative to Public or Constitutional Law and History, or making it essential for the degree, and some others. It might be expected to fall into disuse and ultimately be abolished. Fifthly, The restoration of the Doctorate to its proper place was a point on which all the legal witnesses examined before the Commission were unanimous. It is certainly rather curious that the only Universities in the country which give a sound and thorough legal training should be the only ones (excluding those which have only an imperfect Law Faculty) which refuse to give the highest degree in the Faculty to candidates qualified by examination. *Ignorantia Juris neminem excusat*. And so any gentleman of respectability is entitled to become a *Doctor utriusque juris*. Imagine the feelings of the Faculty of Divinity, if every man who went regularly to church was qualified for a D.D. ! or those of medical men, if every man who was regular in his habits could claim the degree of M.D. ! The Commissioners do not seem to be aware that the present system by which Law represents *all learning* is a relic of mediæval ignorance. They forget that Law is now a special science and must be cultivated by the ordinary scientific methods. It is a sad and humiliating confession—and all the more so, that it is an unconscious one—of the backward state of Scientific Jurisprudence in this country.—I am, yours, etc.

WM. GALBRAITH MILLER.

Review.

Digest of the Scottish Law of Evidence. By JOHN KIRKPATRICK, M.A., LL.B., etc., Advocate. Edinburgh: William Green. 1882.

MR. KIRKPATRICK has performed admirably a by no means easy task. By condensing into a wonderfully small space a very large amount of matter he has produced a most valuable hand-book of the Law of Evidence. Perhaps there is no legal subject which, with greater advantage to both Bench and Bar, could have been so treated. Questions relating to evidence usually arise in the course of a trial and have to be decided at once, often under circumstances which render an examination of bulky legal authorities impossible. There should be no difficulty in carrying Mr. Kirkpatrick's little volume even to the remotest Small Debt Court in the country. The style is clear and the arrangement good, the paragraphs being numbered and "the more important general rules of evidence" printed in large type; while by way of appendix there is a useful table of statutes relating to evidence in the order of their dates, and extending over a period of more than four centuries. Space being a consideration, the author must have felt

considerable difficulty in deciding what points were really essential, and it might not be difficult to discover omissions. We do not observe, for example, a reference to that important and somewhat obscure subject of "proof before answer," while the law relating to qualified admissions on record might possibly be clearer. But after testing the work, we have no hesitation in recommending it to the profession as one which will prove of the greatest use in everyday practice.

The Month.

Juvenile Offenders.—A bulky Blue-Book has been recently issued containing the reports of the Magistracy in England, Scotland, and Ireland, in answer to a circular addressed to them by the Secretary for the Home Department. The subject of inquiry and opinion was, "The State of the Law Relating to the Treatment and Punishment of Juvenile Offenders." The volume embraces a mass of curious and interesting facts and diversified opinions from gentlemen whose position and experience make them conversant with the important subject submitted to them. We first will collect the answers and opinions of the Sheriffs in Scotland, both principal and resident, on the subject whether whipping ought to be made a punishment inflicted on juvenile offenders.

The Sheriffs-Principal remitted the question to a committee of their number, whose report was approved and adopted on 21st January 1881. It is remarkable that whipping, as a mode of punishing juvenile offenders, is not once noticed in the report (Report, p. 182). The Sheriff of Lanarkshire (Clark) says: "The increased use of flogging has been advocated as a substitute for imprisonment in cases of juvenile offenders. I deem it my duty to record my strongest dissent from any such proposal. I must be understood as speaking of Scotland only. As to England, with whose manners and customs I can claim no acquaintance, I offer no opinion. In Scotland during the last century, and well into the present, corporal punishment was the recognised mode of enforcing discipline. Teachers beat their pupils, masters their servants and apprentices, parents their children, and even husbands their wives. Flogging in the army, the navy, and the prison was common. Nothing tended more powerfully to brutalize the masses and retard the growth of civilization; crime was prevalent to a degree now happily unknown. But just as these practices, which I can only regard as relics of barbarism, tended to diminish, did crime, particularly of the more violent kinds, become more and more rare. I can well recollect when flogging was habitually practised in Scotch schools. Its gradual abandonment has been coincident with improvement in tuition and a still more marked improvement in

scholastic discipline. Most people must have observed that in families where corporal punishment has been altogether unknown how little trouble parents received on account of their children; while in other families, where the rod was resorted to, there were many sad examples of depravity. In dealing with youthful delinquents as a magistrate I have questioned the parents as to how they managed their children, and I have almost uniformly found that their only notion of training was the use of the rod. From these considerations I am humbly but strongly of opinion that corporal punishment is not only unnecessary, but hurtful in the family and the school, and by parity of reasoning I regard it as still more so in the tribunals whose procedure should inculcate mildness of manners, and should hold forth something to be imitated, not shunned, by the community. I have often heard it confidently asserted that when youthful offenders have been flogged they never again appear before the magistrate. This certainly does not accord with my own experience. On the contrary, I have known instances of men sentenced to penal servitude who as boys had been flogged for trifling offences. It is, of course, impossible to lay down a rule to which there shall be no exceptions; but it is important to bear in mind that, while punishments of a violent and ignominious kind may check particular offences, such a result is dearly bought if they prove inimical to that mildness of manners from which alone any permanent diminution of crime can be expected" (p. 184).

The Sheriff of Midlothian is the only other Sheriff whose answer is given in the volume, and he does not allude to the matter of whipping.

We proceed to give the answers returned by the various Sheriffs-Substitute, or, more properly, resident Sheriffs, who are more directly engaged in the administration of criminal justice. We first give the opinions of those of this class who support the elaborate opinion of Sheriff Clark of Lanarkshire:—

1. One of the resident Sheriffs at Aberdeen (Dove Wilson) says: "I am entirely opposed to the punishment of flogging for juvenile, or, indeed, for any offenders. During the last century flogging was a punishment of great frequency in Scotland. Since that time public opinion, except in rare moments of irritation, has pronounced with great decision against it. I think this verdict right, but in any view I think that the fact that any attempt to revive that punishment will certainly fail must be accepted" (p. 188).

2. The resident Sheriff at Tobermory (Ross) says: "I do not approve of the use of the birch-rod, and think that the use of it should be left in the hands of parents" (p. 192).

3. The resident Sheriff at Fort William (Simpson) says: "I think that whipping should be rarely resorted to. It leaves a stigma on the character of the boy subjected to this punishment such as time itself cannot take away. It hardens the heart instead of leading to improvement or tending to reformation. It has been, but it cannot be fairly compared in

any sense or degree with school punishments. There are many compensatory considerations to a child having the misfortune to be punished in school. Their friends and companions have at some time or other been punished in like manner; the infliction of the birch or lash was in the mind of the child probably—in some cases certainly—unjust, and so after a time the sense of pain and shame is forgotten. Not so, however, with the subject of birch punishment for offences by warder or other official in prison. It becomes known that the child was so punished, and he is never allowed to forget the degrading fact. If possible this punishment should be discontinued" (p. 193).

4. Sheriff-Substitute Spens of Glasgow says: "I know that many able and tender-hearted men advocate the flogging of children charged with first offences. I have always objected to this punishment for first offences, though I admit my objection is not equally applicable in the case of a second or further offences. I confess I have a strong repugnance to flogging, chiefly through the belief that it may utterly and absolutely pervert the nature of the child. I mean there are certain natures which may be good in themselves, but which by the public indignity of the lash will be irretrievably ruined. Possibly, nay probably, the more sensitive the character, and therefore the better the nature, the greater the risk there is of demoralization through infliction of the lash, and I think it quite impossible for magistrates to attempt any successful gauge of character in children brought before them for the first time. I should not have the same objection to an order made upon the parent to flog the child in presence of a witness named by the Court, the failure to carry out properly such order being punishable by a fine on the parent" (p. 210).

5. Mr. Orphoot of Peebles says: "Whipping—I am informed that it sometimes happens that after the boy is whipped in prison a 'juvenile offender' is treated by injudicious relatives as a martyr, and the benefit of the punishment is destroyed. It might perhaps do something to correct this to enable the magistrate to order the whipping to be administered by the parent or person in *loco parentis*, and at the sight of a police constable, or, on failure, then by the 'whipping official'" (p. 222).

6. Mr. Barclay of Perth says: "I have never, in any case, resorted to the punishment of whipping. I am of opinion that to treat a *child* as a *brute* inevitably *brutalizes* him for life. The rod is beneficial in the hands of a discreet parent or teacher. It is not an instrument fit in the hands of the magistrate to be used on children. I have observed that boys have been brought before me with oft-recorded previous inflictions of the lash in other counties without any apparent beneficial result" (p. 223).

7. Mr. Smith, Greenock, says: "I cannot offer an opinion on the expediency or otherwise of giving ample powers to order corporal punishment in the case of boys' offences against the law. So far as I can judge there is a strong public feeling here against such punishment. I have only ordered it once, I think, and on that occasion it was not carried out because nobody could be found to inflict it" (p. 225).

8. Provost Shortridge of Dumfries says: "I have seen very little good result from the use of the rod in the family, and think that only in very exceptional cases it should be resorted to" (p. 201).

9. Mr. Smith of Elgin and Nairn says: "I never had occasion to order whipping" (p. 201).

So far the above magistrates unite with Sheriff Clark as to the inexpediency of whipping children as a sentence of punishment for offences. There are several opinions adverse to the total abolition of this punishment, but these opinions are generally given with hesitation and represent whipping "under difficulties."

1. The Sheriff-Principal of Argyleshire (C. Irvine) says: "I am in favour of continuing whipping as a punishment for male offenders, and consider the existing regulations on this head sufficient. I do not think that the brand of infamy, which I have referred to as associated with a sentence of imprisonment, is a necessary consequence of this mode of punishment" (p. 181).

2. One of the resident Sheriffs at Aberdeen (Comrie Thomson) is of opinion that (but contrary to his brother Sheriff Dove Wilson, *supra*, 1) "the existing Scotch law on the subject of whipping juveniles should be maintained except that not more than twenty stripes be inflicted on a young lad between fourteen and sixteen, and that where more than twelve strokes or stripes are ordered a medical man should be present" (p. 188).

3. Mr. Dundas of Campbeltown says: "I believe whipping to be the most deterrent form of punishment for children, and I think that it should be more commonly used than it now is; the existing law on the subject appears to me satisfactory. I do not think it would be practicable or expedient to lay down a general rule that such and such offences by children should in all cases be punished with whipping, nor do I think it would serve any good purpose to sentence the same offender to repeated inflictions of the same punishment, which, like most others, is apt to lose its effect by repetition. If a boy has been brought up for trial two or three times, and after being whipped each time still continues to offend, it seems clear that the punishment is not sufficiently deterrent, and that something else must be tried. I am not disposed to think that an alteration of the law is necessary as to this punishment; but it might be expedient for the Home Secretary to call the attention of judges and magistrates to the power which they already possess of awarding this penalty, and to suggest that they should more freely avail themselves of it" (p. 191).

4. Mr. Anderson of Kilmarnock, Ayrshire, says that "the Whipping Act, I am sorry to say, is a dead Act so far as this county is concerned. Immediately on the passing of the Act I got the specified apparatus, tawse, board, etc., prepared, and had the punishment administered in one or two cases. But the prison warder employed to do so, on appearing on the streets, was so mobbed by a crowd calling out 'hangman,' etc., that he preferred resigning the situation rather than perform the duty. Being strongly impressed with the value of the Act as a powerful deterrent in the case of young boys found guilty of petty crime, I got a warder from Glasgow Prison to administer the punishment for a short time; but the Crown authorities refused to sanction the expense of bringing the warder from Glasgow, and the items having being disallowed by Exchequer in the Fiscal's outlay, we were obliged, to my great regret, to give up further attempts to enforce the Act" (p. 194).

5. Mr. O. Paterson, at Ayr, briefly states: "Whipping under proper regulations, if power *discreetly* exercised, would *probably* prove a most useful deterrent against juvenile crime and substitute for imprisonment" (p. 195).

6. Mr. Spittal, Banff, states: "The punishment which I believe most suitable for the majority of juvenile offenders is that of the lash. But here I have to state a local difficulty. No one has been whipped in this county since 1854. There is neither a suitable instrument nor any one to make use of it if it did exist. I am to understand that a person was once appointed for the purpose, but that he found so much odium attached to the office in the mind of the public that he speedily resigned. The Act does not state who is to carry out the sentence of the law. I think it should be a duty which any policeman may be called on to perform under proper restrictions, and that all prisons and prison cells should be provided with the necessary instruments. I have no doubt that the practical difficulty I have here pointed out exists in most of the more rural districts. While acting as Sheriff-Substitute in Glasgow some years ago I had occasion to impose a sentence of whipping, and, although a very light one, I was struck with the effect it seemed to have upon the minds of the culprits" (p. 195).

7. Mr. Rampini of Lerwick suggests "sentence of fine, with the *alternative* of flogging—the flogging might be with a cat-of-nine-tails for boys above fourteen, and with a birch-rod for children below that age. The necessity for the presence of a medical man does not, in nine cases out of ten, seem to exist. The punishment might be inflicted in any lock-up, police station, or other convenient place, and within (say) six or twelve hours after conviction" (p. 198).

8. Mr. Johnstone of Alloa is of opinion "that if the provisions of the Whipping Act were more generally taken advantage of throughout the country, the imprisonment of children after trial might be obviated to a very great extent" (p. 200).

9. Mr. David B. Hope of Dumfries observes: "We have what is so much desiderated in England, the power to order juveniles (male) to be whipped for nearly all, if not all, offences. I may mention cases of mischief, such as the killing or maiming of poultry by stoning (a common country offence), throwing things at bicycle-riders to their injury, damaging gates, etc., stealing from gardens, as suitable for such punishments only. With the sentimentalism which objects to such punishment as 'degrading' I have no sympathy. The feelings of the lower orders are not so fine as such objectors seem to imagine. The 'birching' in public schools is neither felt by the victims of it, or by their companions, as anything but a very proper mode of punishment, and no degrading effects are the result. Of course it is a disgrace to be caught in wrong-doing and punished, but that is inevitable whatever the mode of punishment be. . . . It has been said 'that one fact is worth a bushel of theories.' I can state as a fact that those who have been whipped are rarely brought up again. I do not remember any instance in my experience" (p. 200).

10. Mr. Cheyne of Dundee says: "I consider whipping the best, and imprisonment the worst, mode of punishment for juvenile offenders" (p. 202).

11. Mr. Robertson of Forfar merely suggests "that offenders be whipped within the precincts of the Court-house, and not in the prison" (p. 202).

12. Mr. Speirs of Portree, Skye, thinks "that the birch-rod is not used enough, and that in many cases, as of malicious mischief, it would have a most salutary effect. Switching is well known and practised in our best public schools, and no one thinks anything of it. Why should it not be administered by the warder (or governor in small jails) of a jail? A dozen stripes might be given easily without the necessity of a medical attendant" (p. 206).

13. Mr. Nicolson of Kirkcudbright states that, during eight years, out of one hundred and twenty-nine juvenile offenders under sixteen years, thirty-two were punished by whipping. "I am always adverse to sending young offenders to prison, and have never done it where any other punishment of an adequate kind could be given. Whipping, on the other hand, I consider the best of all punishments for boys, except where they give repeated and clear indications of a criminal disposition requiring more continuous discipline. It is no degradation compared with imprisonment, and it is much more feared. For malicious mischief it is particularly appropriate as a punishment, and very effective, as is indicated by the fact that there has been no repetitions of that offence for a long period" (p. 207).

14. Mr. Erskine Murray of Glasgow states: "My practice during the twenty years that I have been Sheriff-Substitute in Glasgow has been, when children have been brought before me on a charge of theft, and the crime admitted or proved, to ascertain in the first place whether the parents were able to exercise in future a supervision over their child and to provide for its education. If there was any reasonable prospect of their being able to do so, and if the circumstances did not justify a dismissal with a reprimand, I ordered punishment by the cane or tawse, according to the age of the child. Only in cases where there was no hope of parental supervision have I ordered the children to a reformatory to save them going utterly to the bad. I have found the results of this practice very successful, as I am aware of very few cases where whipped boys returned to crime; whereas boys sent to a reformatory are boys simply reprimanded, and too often return to crime. I have found as a rule the parents rather glad than otherwise of the imposition of the penalty of whipping, as it strengthens their authority with their children without putting bad blood between father and child. It must be remembered that in far too many cases juvenile criminals are not the children of criminal parents, but of hard-working and comparatively respectable people. When a gang of boys take to emulate the exploits of Jack Sheppard, there is nothing like the tawse for tearing off the false glory, and associating with crime not only the sensation of pain but that of ridicule" (p. 207).

15. Sheriff Guthrie of Glasgow merely states that "it appears to him not desirable that the Court should have no alternative but to punish the child or let it away, or relieve the parents of its care. A small fine on the parent will make him realize his duties better, and probably attain without trouble or stigma the same end as a whipping sentence" (p. 209).

16. Sheriff Birnie of Hamilton states that "cases have occurred there

where a smart imprisonment struck him as more appropriate than either a whipping or a reformatory. At the same time he would retain the power of whipping to the age of sixteen, and of sending to a reformatory to the age of fifteen and nine months" (p. 218).

17. Sheriff Home of Linlithgow states his practice to be "for the first offence, especially in the case of the younger boys and girls, they have been generally reprimanded and sent away, with a warning of the consequences of repeating the same. If, however, there has been anything more serious or deliberate in the matter charged, especially in the case of the more advanced boys, they are sent to prison for twenty-four hours, to get a flogging of eight or ten stripes before being liberated." "The rod may check for a time the commission of offences, but has no tendency to reform, and the regulation rod now in use is one very unlike what most of us have known and been acquainted with at school" (p. 219).

18. Sheriff Hamilton of Edinburgh states that regulations under the Edinburgh Police Acts for whipping "have never been made, and the consequence is that the Sheriff or Magistrate presiding in the Edinburgh Police Court is unable to order a boy to be whipped, a mode of punishment which might, I think, be *occasionally* resorted to with advantage" (p. 220).

19. Sheriff (Principal) Napier of Peeblesshire is of opinion "that under proper regulations and medical supervision the punishment of juvenile offenders by flogging with the birch-rod should be more frequently resorted to and greater facilities given for it, and should be made competent for all offences at present punishable by imprisonment either as an *alternative* for fine or otherwise, and to all Magistrates having at present the power of imprisonment, and that instead of the place for such punishment being limited as at present to being within a prison, the Magistrate should have the power of appointing what he considers a suitable place (such as a police cell) in each particular case, and it may be a question whether a prison should not be wholly forbidden as the place. In my own county of Peebles such mode of punishment is now almost prevented, or made unsuitable by the close of the Peebles Prison, and the necessity of sending juvenile offenders to Edinburgh Prison for infliction of such punishment" (p. 221).

20. Mr. Cowan, the resident Sheriff at Paisley, says: "I am aware that some persons are of opinion that whipping ought to be abolished. Such is not the view I am led to take. As a *general* rule, I am much averse to it; it ought to be resorted to as *rarely* as possible. In my judicial experience I have only *once* ordered its infliction. The case was a very bad one—a boy utterly and hopelessly incorrigible. The effect of the whipping was salutary. The boy is now an inmate of the Kibble Reformatory here, and doing well. I would be sorry to see the power of whipping abolished, as it gives for *extreme* cases a remedy without which they cannot be hopefully dealt with" (p. 224).

21. The resident Sheriff at Stornoway answers: "As regards sentences of whipping, the jailer's duties ought to include that of executing these sentences. *Note*.—Recently I sentenced three Stornoway boys, convicted of a petty theft, to receive twelve strokes with a birch-rod. The jailer refused to execute the sentence on the plea that his doing so would render him odious in the eyes of the Stornoway people. He told

me that before my appointment as Sheriff-Substitute here he had sometimes got the whipping done by a man-of-war's man (if a warship happened to be in the bay), sometimes by one of the prisoners in jail, and sometimes by the child's father. In the case of the three children referred to the whipping was performed by a person whose face was previously blackened. Mem. 1. Such difficulties and practices tend to bring the administration of the law into contempt. 2. Unless there be an official whipper the degree of severity with which the sentence is executed must constantly vary, and must depend on the merest accident. 3. If the community knew that the jailer was doing the whipping not spontaneously, but compelled to do it *ex officio*, the odium attached to his whipping a boy would probably be lessened" (p. 226).

22. The resident Sheriff at Roxburgh only suggests "that the whipping might be conveniently administered in a police cell or other place to be designated in the sentence, not necessarily being a prison" (p. 228).

23. The resident Sheriff at Selkirk says: "I have a very decided opinion in favour of whipping. Imprisonment gives a juvenile offender a certain degree of importance in the eyes of his companions, while whipping does not. Thus, the one form of punishment tends to foster evil propensities, the other acts as a deterrent. At the same time, the Court ought not to be altogether deprived of the power of passing sentences of imprisonment—a power to be exercised, however, only in exceptional circumstances" (p. 228).

24. The resident Sheriff at Dornoch states: "I have in practice almost invariably avoided sending juvenile offenders to prison, and I have in those cases where something more than a mere admonition from the Bench was necessary substituted personal chastisement by whipping as the more appropriate punishment. In some few cases this whipping has been administered within the prison, but in the generality of instances the parents or guardians of the 'juveniles' have themselves (being present in Court) undertaken to give effect to a punishment of this description if the case was adjourned to afford them an opportunity of doing so. And I have found that a castigation of this sort, administered commonly in the sight of the police constable of the district, is so sufficient a deterrent as to justify the Procurator-Fiscal in not moving for sentence at the adjourned diet, or myself in pronouncing no penal sentence; and in these cases I have invariably found that juveniles so treated have never come before me again charged with crime" (p. 230).

25. Lord Provost Easlemont of Aberdeen states: "Notwithstanding all that has been said against it, I am still disposed to believe that whipping is about the best and least degrading punishment that has been devised. It should, however, be had recourse to only in *extremely aggravated cases of wickedness*" (p. 231).

26. The Town-Clerk of Ayr suggests "that Magistrates should have power to order juveniles to be whipped, subject to *suitable regulations*" (p. 232).

27. The Lord Provost of Edinburgh recommends that "the Magistrate should retain the power of ordering the infliction of corporal punishment as the *sole* penalty, or, in addition, to either commitment to prison or a Reformatory or Industrial School" (p. 232).

Other Sheriffs and Magistrates express no opinion on whipping as a punishment on juvenile offenders. NESTOR.

Justice Onoocool Chunder Mookerjee.—The Hindoo-English author of a "Memoir of the late Honourable Justice Onoocool Chunder Mookerjee" thus describes the merits of the subject of the memoir before his elevation to the Bench: "Since he joined the native Bar down *ad finem* of his career as a pleader, he had won a uniform way of pleading. He made no gairish of words, never made his sentences long when he could express his thoughts in small ones. Never he counterchanged strong words with the pleaders or barristers of the other party. In defeating or conducting a case his temper was never incalescent and hazy. He well understood the interest of his client, and never ceased to tussle for it until he was flushed with success, or until the shafts of his arguments made his quiver void. He was never seen to illude or trespass upon the time of Court with fiddle-faddle arguments to prove his wits going a-wool-gathering, but what he said was nude truth, based upon *jus civile*, *lex non scripta*, *lex scripta*, etc., and relative to his case and in homogeneity to the subject-matter he discussed, and always true to the points he argued. He made no quotation having no bearing whatever to his case, but cited such Acts, clauses, and precedents that have a direct affinity to his case, or the subject-matter of his argument. By-the-by, I should not here omit to mention that he had one peculiarity in his pleading which I have observed very minutely. Having first expounded before the Court the anatomy of his case, he then launched out on the relative position of his client with that of the other, pointing out the *quidproquo* or bolstering up the decision of the lower Court with his sapience and legal acumen and cognoscence, waiting with quietude to see which side the Court takes in favourable consideration, knuckling to the arguments of the Court, and then inducing it gradually to his favour, giving thereby no offence to the Court."

[*Note.*—"Anonymous" is requested to send his name and address to the Editor.]

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF KILMARNOCK.

Sheriff ANDERSON.

WYLIE v. WYLIE.

"*Kilmarnock*, 16th March 1881.—The Sheriff-Substitute having heard parties' procurators, and considered the closed record, productions, and whole process, Repels the whole of the defender's pleas in law except the last: Finds the action is at the instance of Mrs. Jane Dunlop or Wylie, wife of John Wylie, draper

in Stewarton, and concludes against the said John Wylie for payment of £300, with interest : Finds the pursuer and defender were lawfully married on the 22nd of July 1873 : Finds at said date the pursuer was the widow of James Wood Martin, flesher in Edinburgh, who died in January 1872, and through whose death she became possessed of funds, relatively speaking, of considerable amount : Finds that on the 21st July 1873, being the day before their marriage, the parties to this action executed the marriage contract No. 5 of process, whereby they agreed, *inter alia*, that the whole property and effects, heritable and moveable, belonging to the pursuer, notwithstanding the pursuer's marriage with the defender, shall still remain her property, for her separate use, and be at her exclusive disposal : Finds that by said deed the defender also expressly renounces his *jus mariti*, as well as right of administration in relation to all property, means, debts, sums of money, estate, and effects belonging to the pursuer : Finds that the defender by said contract bound himself to solemnize the marriage with all convenient speed, but came under no other obligation as regards the pursuer : Finds that very shortly after the marriage, and on the 26th of August 1873, the defender obtained from the pursuer £300 of her private means and estate to enable him to carry through a negotiation with his father, James Wylie, for the purchase of James Wylie's drapery business in Stewarton, now the defender's property : Finds the said sum of £300 was duly paid over by the defender to James Wylie in terms of the receipt No. 9 of process, produced by the pursuer : Finds the defender admits in his answer 4th to pursuer's condescendence that he acquired his father's business, and that he was not himself possessed of sufficient funds to pay for the same : Finds the defender in his second statement of facts avers that when he married the pursuer he was merely a salesman in his father's employment, and he does not allege that he was possessed of any means whatever : Finds the defender, by said contract of marriage, did not and could not make any provision for the pursuer in the event of her surviving him, and that there is no ground whatever for his second plea in law, that the pursuer's advance to him of £300 was remuneratory and for a consideration, and therefore not revocable : Finds the defender's averments in the 3rd and 4th articles of his statement of facts, that while his marriage with the pursuer was in terms of arrangement, she undertook as soon as they were married to make a provision for him of £500 to set him up in business, and that the £300 was paid to account in implement of said provision, is in the circumstances an irrelevant statement, and cannot be admitted to proof : Finds the pursuer's undisputed payment to the defender of £300 from her own private and separate estate after her marriage to the defender was a *donatio inter virum et uxorem*, therefore revocable, and has been revoked by the institution of this action : Finds the defender alleges that the pursuer, who has left his house and ceased to reside with him, when she went away took £80 in cash, and goods to the extent of £30, while the pursuer admits this is true to the extent of £38 in cash, and goods of the value of £5, but says it has been expended on the necessary support of herself and children : Finds that the question whether the pursuer was legally justified in separating herself from her husband's society and refusing to live in family with him is not raised in this case, and cannot be determined here : Finds the pursuer is bound in the meantime to count and reckon with the defender for whatever property belonging to her husband she carried away when she left his house : Therefore, and before answer, allows the defender a proof on this latter point but on no other, the pursuer a similar proof, and the defender a conjunct probation, and appoints parties' procurators to meet with him next Wednesday for the purpose of fixing a diet for proof, and decerns.

THOMAS ANDERSON.

Note.—The above specific findings render it unnecessary to add much by way of explanatory note. It appears to the Sheriff-Substitute that there is really no substantial defence to the action. Indeed the only defence maintained in argument amounted to this that the £300 was remuneratory, given

for a consideration and therefore not revocable. When pressed to specify what the consideration was, the defender could only reply that the pursuer had not renounced her right of *terce* and *jus relictae* in the marriage contract, and also that the enhanced social position she occupied as the wife of the owner of a drapery establishment, instead of a mere salesman in it, was important: that considering her means, it was a reasonable and rational application of a portion thereof, as a judicious investment in her own interest as well as in that of her husband and children, and in support of this view he relied on the *dictum* of Fraser as exemplified by the case of *Hutchison*, which the learned author was then commenting on, and also on the case of *Outhill v. Burns*. The state of matters in these cases was entirely different from the present. In the above reference to Fraser, it will be noticed that he is treating of the wife's heritage actually converted into moveable estate during the existence of the marriage, and on her separate moveable estate mingled with her husband's funds. Fraser there says the rule entitling the wife to reclaim her funds mingled with those of her husband and used by him must be taken with reasonable limitations, and then he refers to the case of *Hutchison*. But it is clear this can have no application to the present case, where so far from the pursuer's funds being mingled with those of the defender, they were most carefully kept separate and apart in the strictest terms that language can express. Besides, a wife is under no legal obligation (except perhaps in the case of actual poverty) to contribute towards her husband's support from her own private means. It is also thought the case of *Outhill* in no way resembles the present, and does not support the defender's contention. It is true that there certain heritable debts over a landed estate to which the husband succeeded were paid off with funds of the wife, from which the *jus mariti* was excluded, and were held not revocable as a donation, being remuneratory. This, however, was only held under special and peculiar circumstances. As already noticed, the wife's money was employed in paying off existing encumbrances upon the estate when the succession opened to the husband. He immediately conveyed this estate of Garvald (which was of considerable value and far greater than the £1500 of her tocher employed in paying the debt) to her and her heirs, only reserving his own liferent, of which estate she was in the full enjoyment when the action was raised. A most substantial consideration! But where is the consideration in the present case? The defender admits that he had no funds at the date of his marriage, and therefore that he did not and could not make any provision for the pursuer in the marriage contract which by any ingenuity can be construed into a 'consideration,' for the advance was made to him before the honeymoon was well over. The principle which alone can justify any exception to the general rule, and which will be found to underlie every case where it was sustained, is, that an equivalent is given by the husband. The defender says the pursuer does not in the marriage contract renounce her right of *terce* and *jus relictae*, which is true enough, but that is no equivalent for £300 paid down. It is a mere expectancy contingent on her surviving her husband, and on the farther contingency of his leaving any funds out of which her legal rights could be satisfied. As regards the defender's averment that he made a bargain with the pursuer, agreeing to marry her only on condition of her paying him £500 after the marriage, and on the faith of which he consented to renounce his *jus mariti* over her moveable estate, it is unnecessary to say much. The Sheriff-Substitute holds these averments are altogether irrelevant and incompetent in the face of the marriage contract No. 5. Even if there had been no marriage contract, and the defender's statement admitted to be true, it would still have been a donation between husband and wife, and revocable. Fraser says, 'If the donation be not completed before marriage, if it be promised then or agreed to be given, and delivery take place after the marriage has been contracted, it is a donation revocable.' This is exactly what the defender alleges. The defender's third plea in law, that the £300 in question, though passing through his hands, was actually paid to James Wylie for a consideration, and therefore not revocable, is clearly bad. If the pursuer

herself had paid the money direct to James Wylie, however irrevocable in a question with him, it would not avail the defender. Fraser says expressly, 'Though the law will sustain a payment by the wife to the husband's creditor, so far as the latter is concerned, yet the husband will be liable to the wife in repayment, if she revoke the deed.' Again exactly the present case, and in the view of it most favourable to the defender. The Sheriff-Substitute considers himself bound to allow the defender a proof as to his allegations of the pursuer carrying off his property when she ceased living in family with him. Probably the parties may be able to arrange the amount by a minute of agreement, and then the case can be disposed of."

Act.—Laidlaw—*Alt.*—Henderson.

SHERIFF SMALL DEBT COURT OF LANARKSHIRE.

Sheriff LEES.

MITCHELL v. CALEDONIAN RAILWAY CO.

Reparation—Railway and Canal Traffic Regulation Act, 1854—Salvage.—In this action John Mitchell, farmer, Knockhouse, Dunfermline, sued the Caledonian Railway Company for the sum of £11, 14s. 4d., made up as follows: "To loss, injury, and damage sustained by the pursuer in consequence of the gross negligence, culpability, and fault of the defenders or their servants, for whom they are responsible, in the circumstances after-stated, viz.: On or about 24th October 1881, four cows belonging to the pursuer were delivered into the hands of the defenders or their servants, or others for whom they are responsible, in good order and condition at Lanark Station, to be carried and delivered to the pursuer at Dunfermline, and which the defenders undertook to carry between the said places with all the liabilities of common carriers; that on the arrival of said cows at Dunfermline Station on 25th October it was found that one of them was seriously injured, through the fault or negligence of the defenders or their servants or others for whom they are responsible, while being conveyed by the defenders between Lanark and Dunfermline, and it thereafter had to be attended by a veterinary surgeon, but its injuries were of such a nature that it had to be slaughtered, and the pursuer has in consequence sustained loss and damage to the extent of £11, 14s. 4d." The pursuer thereafter concended on the details of his damage, which are narrated by the Sheriff-Substitute in his judgment. The case came under the Railway and Canal Traffic Regulation Act, and the defenders in admitting liability claimed the value of the carcass, maintaining that if they paid what was claimed, up to £15, they were entitled to the salvage.

The Sheriff-Substitute, in giving judgment, said: "In this action the pursuer asks payment from the defenders of £11, 14s. 4d. as the amount of loss he has suffered through their negligence in the carriage of a cow for him from Lanark to Dunfermline in October last. The defenders admit liability; and the only point on which parties differ is that each claims the value of the carcass of the cow. By the 7th section of the Railway and Canal Traffic Regulation Act, 1854, it is provided, as regards cattle, that 'no greater damages shall be recovered for the loss of, or for any injury done to, any of such animals in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, than £15 per head, unless the value be declared and such premium paid as the company may demand. In this case the value was not declared; and the defenders contend that if the pursuer gets the sum he claims, and also the carcass of the cow, he will get more than £15. But the question is to be decided not by a consideration of what he will get, but what they will have to pay. The statute was passed with a view to limit their liability, and apart from any consideration of the measure of the sender's loss. His loss may be £50 or £500. If they so injure his cow as to render it practically valueless, and he claim its full value, then as they thereby

become compulsory purchasers, they pay the value of the cow and they keep what is left of it ; but if, as here, the claim made is for the depreciation in value due to the injuries received, then the claimant keeps the carcass. It is obvious that the depreciation is just the difference between the value of the cow delivered at Dunfermline safely and delivered injured, and the depreciation and the salvage make up the original value. Here the value of the cow to the pursuer, if it had been delivered safely at Dunfermline, would have been £19 0s. 4d. The costs incurred in trying to save its life and in dressing its carcass for the market after its death were £1, 13s. 6d., which, being deducted from the gross salvage value of £8, 19s. 6d., leaves £7, 6s. as the net value of the salvage. The difference between this sum and £19, 0s. 4d. is £11, 14s. 4d., and is the measure of the depreciation in value to the pursuer (apart from loss of possible profit) if he keeps the salvage. And as by his so doing, the defenders are not made to pay damages to a greater amount than £15, I think his claim is just. In this way the owner of the injured animal never gets more than its value, and the Railway Company never pay more than £15. But if the defenders' contention were sound, and if the salvage value exceeded £15, then the owner of the injured animal would either make no claim and the company would not suffer for their fault, or if he did, they would pay £15 and get what was worth more, and so make a profit by their own negligence. I therefore give decree for the amount with 4s. 8d. of expenses."

Act.—Wilson.—Alt.—Glen.

Sheriff SPENS.

ROWIE v. GLASS.

Poor—Indigence of pauper being wholly due to dependents whom defender was not bound to aliment—Claim of relief at instance of relieving parish disallowed.—James Bowie, inspector of poor, Alloa, sued James Glass, ship-carpenter, residing at 44 Merkland Street, Partick, for £3, 2s. 6d., in respect that he is son-in-law of Mrs. Isabella Donaldson or Johnston, 11 Clyde Street, Partick, a pauper chargeable to the parish of Alloa—this sum being the proportion due by defender at the rate of 2s. 6d. per week of aliment. Mrs. Johnston, though herself able-bodied, was pauperized by having five children. The defender maintained that in these circumstances, as he was not bound to aliment them, there was no valid claim against him. The pursuer contended that the cause of her poverty was *jus tertii* to defender, that the mother was the pauper, and the defender was bound to aliment her. The Sheriff-Substitute, in giving judgment, said : "A question of very considerable importance in poor law is raised in the present case. The question is solely one of law, for, as I understand, there is no dispute as to the facts. The pursuer is the inspector of the parish of Alloa, and the defender is the son-in-law of Mrs. Isabella Donaldson or Johnston, who is sued by the former for repayment of money paid by the parish to his mother-in-law since 2nd August 1881. The defender is sued only for half of the actual money paid. Another action was directed against a son, claiming the other half of said advance from him, but the action was dismissed on the ground that, from ill-health and non-employment, he was not in such a position that he could be legally called upon to contribute, what he was earning being barely sufficient for the support of himself and family. The defender in this case has, however, admittedly over 30s. a week, and only two children. I cannot therefore say that if he is otherwise legally liable to repay the advances made to the extent of 2s. 6d. a week, the claim can be defeated in this case by the plea of inability through poverty. Mrs. Donaldson, it is admitted, is an able-bodied woman, but she has five children of the ages respectively of fourteen, eleven, eight, six, and four. These children were born in the parish of Govan. Mrs. Donaldson is chargeable to Alloa. The relief, it is obvious, which Alloa gives, comes to be given in consequence of Mrs. Donaldson's dependents. It is of course settled law that a brother is not bound to aliment

his brothers or sisters, and a *fortiori* a brother-in-law is not bound to aliment his brothers- and sisters-in-law, and the question which I have to determine here is whether this being law, I can make any inquiry in a question of relief as between the relieving parish and the son or son-in-law of the person relieved as to how chargeability emerges. There would be no doubt whatever that if Mrs Donaldson was old or infirm, for relief afforded to her for herself the defender would be liable, and the agent for the parish contends that it being settled law that the mother is the pauper and not the dependents, and their status being inseparable from that of hers, any relief given to her, whether for herself or her dependents, is in a question with any one else relief, which the parish is entitled to hold as given solely to her. It is said if it be a fiction of law the mother and children are inseparable when the relief given is really relief given for behoof of the children, it is a fiction of law by which the pursuer in this case suffers, for were they separable, Govan would require to pay for the children. The children were born in the parish of Govan, and Alloa would have to pay nothing at all on account of an able-bodied woman. I have been unable to discover any case in the books directly bearing on the subject ; but whatever fictions of law there may be with reference to public questions (if I may so term them) as between parish and parish, it seems to me that in a question of relief between a parish and a private individual, the Court is entitled, as matter of equity and common-sense, to consider whether the real cause of the advance of money to the person for which advance relief is sought infers legal liability as against the person who is defender. If this conclusion be arrived at, it necessarily follows that defender is not liable, because then it plainly appears that he is being called upon to aliment his brothers- and sisters-in-law. If a different conclusion were arrived at, it seems to me that it would lead in some cases to grossly harsh and absurd results. If, for instance, a man married the daughter of A. and B., and A. having died, B., an able-bodied woman, had illegitimate children, and in consequence of these illegitimate children, became chargeable to the parish, it would surely be monstrous to hold that the son-in-law was to pay for the support of his mother-in-law's illegitimate children. But no legal distinction could be drawn between such a case and that which I am called upon to decide here. I have therefore come to be of opinion that defender is entitled to absolvitor. I have consulted with my colleagues on the subject, and I give this judgment as the result of the opinion of the majority. Sheriffs Guthrie, Lees, and Mair agree with the result of this judgment, but Sheriffs Murray and Balfour take a different view.

Act.—Clark.—*Alt.*—Colquhoun.

SHERIFF COURT OF FORFARSHIRE (DUNDEE).

Sheriff CHEYNE.

COWE v. MORISON.

School Board Election—Returning officer.—A petition was presented before Sheriff Cheyne in Dundee, March 29th, at the instance of George Cowe, farmer, Balhousie, against J. P. Morison, Vine Cottage, Newton of Panbride, the returning officer for the election of the School Board of Panbride, asking the Sheriff to declare that the pursuer, the Rev. James Innes, and John Wilson, farmer, Panbride, had been duly elected as members of Panbride School Board ; and his Lordship was further asked to fix a date for the election of a chairman of the Board. The petition set forth that the election was fixed for 20th February, that eight persons were duly nominated for the five seats, that five of those withdrew by the 11th, the last day for receiving notices of withdrawal, and that the returning officer should have declared the three remaining candidates—Messrs Cowe and Wilson and the Rev. Mr. Innes—duly elected. Mr. J. P. Kyd appeared for the petitioner, and Mr. Caesar for the respondent.

Mr. Cæsar objected that his Lordship had no jurisdiction, and that the petition as laid was incompetent.

The Sheriff asked why the returning officer did not do his duty by declaring these three gentlemen elected, seeing they formed a majority of the Board?

Mr. Cæsar—Because one of them—Mr. Wilson—withdrew; therefore there was no election. This gentleman withdrew on the 13th, and Mr. Kyd says he should have withdrawn on the 11th.

Mr. Kyd—I am prepared to prove that this letter of withdrawal was written and signed on the 13th, and antedated the 11th.

Mr. Cæsar admitted that the letter was written on the 13th and dated the 11th, and accepted by the returning officer.

The Sheriff—The returning officer must have a curious notion of his duty in accepting, two days after the expiry of the proper time, an antedated letter of withdrawal.

Mr. Cæsar replied that the returning officer, on receipt of Mr. Wilson's letter of withdrawal, called, with Colonel Guthrie, the former chairman of the Board, on Mr. Wilson, who told them he did not mean to attend the meetings, so that the election would have fallen owing to the want of a quorum.

The Sheriff—The duty of the returning officer was to have declared that these three gentlemen had been elected.

Mr. Cæsar—He did not require to declare them elected until the 20th February, and previous to that date he had Mr. Wilson's withdrawal in his hands.

The Sheriff—The returning officer seems to me to have conspicuously showed his unfitness.

Mr. Cæsar—I don't think it was the returning officer who was to blame.

The Sheriff—Most clearly it was.

Mr. Kyd—I am prepared to prove that the returning officer solicited Mr. Wilson to withdraw, and agreed to accept his antedated letter.

Mr. Cæsar—Mr. Wilson explained that he was indisposed.

The Sheriff—That does not matter; he had lost his chance of withdrawal.

Mr. Cæsar said that even although the returning officer had done wrong, he did not think the Sheriff could give effect to the petition.

The Sheriff said that although he found the three gentlemen named had been duly elected he did not think he could fix a date for the election of a chairman of the Board, as craved in the petition. He was afraid that, owing to the time which had elapsed, there would require to be a new election. He would consult Sheriff Trayner on the subject before issuing his judgment.

The following interlocutor and note were afterwards issued:—

"*Dundee, 30th March 1882.*—The Sheriff-Substitute having heard parties' procurators, and considered the petition along with the defences and whole process under reference to the accompanying note, Finds and declares that the pursuer and the Rev. James Innes, clergyman, Newton of Panbride, and John Wilson, farmer, Panbride, were duly elected members of the School Board of the parish of Panbride, and ought to have been declared as so elected on 20th February last, being the day fixed for the election, by the defender, the returning officer, but *quoad ultra* dismisses the petition as incompetent, and decerns: Finds the defender liable in the pursuer's expenses, allows an account of these on Scale I. to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report.

JOHN CHEYNE.

"*Note.*—As regards the competency of the first part of the prayer of the petition I entertain no doubt, and, assuming I am right on that point, the pursuer is clearly entitled to the declaration he seeks. It is admitted by the defender that at 12 P.M. of 11th February, when the time for withdrawing any candidates expired, only five out of the eight candidates nominated had withdrawn. There remained therefore unwithdrawn a sufficient number of candidates to constitute a quorum, and had nothing intervened, the defender would

doubtless on the day fixed for the election have declared these three candidates to have been duly elected. It appears, however, from the defender's statement that on the morning of the 13th February, Mr. Wilson, one of the three unwithdrawn candidates, came to him and stated that he had been nominated without his consent, and had made up his mind to attend no meetings. A formal letter of withdrawal, antedated 11th February, was then and there written out and signed by Mr. Wilson; and, treating this as a good withdrawal, the defender reported to the Education Department that the candidates nominated and not withdrawn were not sufficient to constitute a quorum. Now, it is quite impossible to justify this conduct on the part of the defender. It was argued on his behalf that he acted from good motives, and that the course taken by him, though it might not be strictly legal, was calculated to secure the speediest constitution of a new Board. Be this as it may, there can be no doubt that he overstepped his province as returning officer, and committed, to say the least of it, a very serious error of judgment. His duty was to obey the rules laid down for his guidance, and he had nothing to do with the consequences. The pursuer asks me in the second part of the prayer of the petition to fix a date for the first meeting of the new Board, the day fixed by the last Board for that meeting being now passed. But I am of opinion—and Sheriff Trayner, whom I have had the opportunity to consult this forenoon, concurs with me in regard to this as well as in regard to the other branch of the case—that I have no power to grant this request. What course the new Board ought to follow in the difficulty that is thus created I must leave it to themselves to determine. Possibly the Court of Session might, in virtue of its *nobile officium*, name a new day for meeting; but probably the simplest course would be to allow the matter to be dealt with by the Education Department under section 15 of the Act of 1872, on the footing that the new Board had failed for three weeks to fill up the two vacant seats. J. C."

Act—Kyd.—Alt.—Cæsar.

Notes of English, American, and Colonial Cases.

BUILDING SOCIETY.—*Charge upon "all the funds, assets, and effects of the society"*—*Foreclosure—Winding up—Building Societies Act—Companies Acts.*—The winding-up provisions of the Companies Acts, 1862 and 1867, are applicable to societies registered under the Building Societies Act, 1874. The defendants were an incorporated society established under the Building Societies Act, 1874. The directors, being empowered by the rules of the society to borrow money, accepted a loan from the plaintiff, giving as security a bond, by which it was declared that "all the funds, assets, and effects of the society shall be held liable for the repayment." The defendants failing to repay the loan, the plaintiff sued them on the bond, and having recovered judgment, commenced an action of foreclosure in the Court of Chancery, which action was pending when a petition was filed in the County Court, and an order was made for the winding up of the defendant society. The County Court judge having refused to grant the plaintiff leave to continue the action of foreclosure,—*Held*, that the appeal would lie by virtue of sec. 43 of the Companies Act, 1867, but that the action of foreclosure ought not to be allowed to proceed, for that the security did not amount to a mortgage.—*Andrew v. The Swansea Cambrian Benefit Building Society*, 50 Law J. Rep. C. P. 428.

INJUNCTION.—*Company—Similarity of names—Registration—Quia timet—Injunction to restrain company from applying for registration—Fraud—Intention to deceive.*—An injunction was granted to restrain a proposed new company from applying to the Registrar of Joint-Stock Companies for registration under a name which, in the opinion of the Court, was calculated to deceive, although

the company had not begun to carry on its business. It is not necessary, to entitle the plaintiffs to an injunction, that the defendants should have a fraudulent intent. They are responsible for the reasonable consequences of their action. The statutory right to register must not be exercised in such a way as to violate some other right, or offend against the law.—*Hendriks v. Montagu* (App.) 50, Law J. Rep. Ch. 456.

RAILWAY COMPANY.—*By-law, divisibility of—Passenger travelling in a first-class carriage with second-class ticket—Intention to defraud.*—The 8th Vict. c. 20, s. 103, enacts that if any person travel in any carriage of the company without having previously paid his fare and with intent to avoid payment thereof, . . . he shall for such offence forfeit 40s. By secs. 108 and 109 power is given to a company to make by-laws for regulating, *inter alia*, "the travelling upon or using and working of the railway," provided such by-laws be not repugnant to the provisions of the Act. By a by-law under the above Act, "any person travelling, without the special permission of some duly-authorized servant of the company, in a carriage or by a train of a superior class to that for which his ticket was issued is hereby subject to a penalty not exceeding 40s., and shall in addition be liable to pay his fare, according to the class of carriage in which he is travelling, from the station where the train originally started, unless he shows that he had no intention to defraud." The appellant was convicted in a penalty of 10s. under this by-law for travelling in a first-class carriage with a second-class ticket, and it was found as a fact that he did so with the intention of defrauding the company:—*Held*, first, that the by-law taken as a whole was void, on the ground that the penalty imposed by the latter part was unreasonable (*Saunders v. The South-Eastern Railway Company*, 49 Law J. Rep. Q. B. 61). Secondly, that the by-law was divisible, but that the conviction could not be upheld, for that the first part of the by-law, which alone was applicable to the case, omitted the intention to defraud required by 8 Vict. c. 20, s. 103, to constitute the offence. It was therefore repugnant to the statute and invalid.—*Dyson v. The London and North-Western Railway Company*, 50 Law J. Rep. M. C. 78.

CRUELTY.—*Domestic animals—Young parrots—Omission to supply water—Jurisdiction of justices.*—The appellant, a foreman to a dealer in foreign birds, sent some parrots from L. to D. by railway in a box without water. They were found at H., a station on the route, after ten hours' travelling, suffering as the respondent alleged, from want of water, which they drank eagerly when offered to them. Upon these facts the magistrate convicted the appellant, under 12 and 13 Vict. c. 92, s. 2, of torturing or causing to be tortured "domestic animals:—" *Held*, that the conviction was bad, on the grounds that there was no evidence of cruelty or that the parrots in question were "domestic animals" within the meaning of the statute.—*Swan v. Sanders*, 50 Law J. Rep. M. C. 67.

Quære, whether, if an offence had been committed, such offence would have been a continuing one.—*Ibid*.

THE JOURNAL OF JURISPRUDENCE.

THE CODIFICATION OF THE LAW.¹

I could wish that the superfluous and tedious statutes were brought into one sum together, and made more plain and short to the intent that men might better understand them : which thing shall much help to advance the profit of the Commonwealth.—KING EDWARD VI.

On sait que jamais, ou presque jamais, dans aucun procès on ne peut citer un texte bien clair et bien précis de loi, en sorte que ce n'est jamais que par le bon sens et par l'équité que l'on peut décider.—PORTALIS.

Optandum esset, ut hujus modi legum instaurationi illis temporibus suscipiatur quæ antiquioribus, quorum opera et acta tractant, literis et rerum cognitione præstiterint. Infelix res namque est, cum ex judicio et delectu ætatis minus prudentis et eruditæ antiquorum opera mutilantur et recomponuntur.—LORD BACON.

IN a speech conspicuous alike for breadth of compass and wealth of accurate detail, the President of the British Association recently reviewed the dazzling progress of science during the past fifty years. It would, we think, be no unprofitable theme for an accomplished jurist of our day to trace the equally remarkable advance of this country in the domain of Law during the same or a nearly similar period. He might follow the course of our Criminal Jurisprudence, showing how from a condition of perilous uncertainty, and in many respects of barbaric severity, it had reached a state more in accord with the ideas and wants of humanity. In like manner he might survey the Civil Law, and trace the processes by which, as the stream of human thought and deed has hurried and broadened onward, that law has slowly but surely adapted itself to the manifold variety and the subtle complexity of modern life, until, in justice, comprehensiveness, and refinement, it may now be pronounced not unworthy the civilization of the nineteenth century.

¹ Paper read to the Glasgow Juridical Society, session 1881-82, by Archibald Craig, M.A., LL.B., Glasgow.

topic. This process is strictly applicable to Statute alone; but it might equally be applied to the principles and rules of Common Law, if it were possible to express these in definite axiomatic form.

By a code in the modern sense of the term is generally understood a republication in an authoritative form, and according to a scientific plan similar to that of a digest, of the whole or of a leading department of the existing law, with such additions thereto and alterations thereon as the completeness and unity aimed at may require. A code differs from a digest in that the heterogeneous materials amassed under each subdivision are to be fused into a homogeneous and organic system, and that, while embodying parts of existing law, it will where necessary abolish other parts, blend new with existing law, and convert the whole ultimate product into Statute. A digest would state the law as it is; a code, as it ought to be. A code would be enacted; a digest not.

In this sense of the word it will be seen that a code is almost entirely a modern conception. The Code Napoléon (or Code Civil, as since 4th September 1870 it has been styled) is the most familiar of the earlier efforts based upon that conception.

To show this more clearly, let the nature of the work achieved by Justinian be considered for a moment.

In his time the sources of law were practically the same as with us, viz. the Imperial Constitutions, analogous to statutes, and the writings of the great jurists, forming a body of law not dissimilar to the Common Law of our day. The main works executed by order of the Emperor were the Code, the Pandects, the Institutes, and the Novels. Of these, the Institutes—designed as an elementary handbook for the use of students—and the Novels, consisting of Imperial Constitutions published after the completion of the Code and Digest, may both for the present purpose be left out of view. The so-called Code and the Pandects (or Digests) are neither more nor less than unscientifically-arranged and in many respects imperfect *Digests* (using the term as above defined) of the Roman Law in force at the time of their execution; the Code being a compilation of Imperial Constitutions issued by Justinian and his predecessors; and the Pandects or Digests a compilation of excerpts from upwards of 2000 treatises by the great jurisconsults, whose opinions were deemed authoritative. In both works the fragments thus culled from statutes (or Constitutions) and treatises retained their original shape; nor were they grouped together upon any logical principle. In short, the ultimate subdivisions alike in the Code and the Digest were left unorganic.

The Imperial Constitutions contained in the Code are partly general and partly special. The former were published by the Emperors in their capacity of sovereign legislators; the latter were of the nature of judicial decisions and orders issued by the Emperors on special points in their character of sovereign administrators. The excerpts from the writings of the jurists contained in

the Pandects are likewise separable into two classes: the first consisting of didactic expositions in general or abstract terms of legal principles; the second, of solutions of particular questions submitted for opinion, and therefore analogous to judicial decisions.

Now in the case of judicial decisions, there is no rule of construction more definitely settled than this, that in extracting from them the *rationes decidendi*, or legal principles involved, the terms made use of must be construed with constant reference to the peculiarities of the case, and whatsoever is not essential to the special decision must be dismissed as *obiter dictum*, and of no authority for succeeding cases. This is precisely what in many cases the compilers of the Code and Pandects have omitted to do; and for the sake of conciseness, or of arriving at propositions of an abstract form, the facts of the cases are often cut away, and the general propositions contained in the special constitutions and the analogous opinions of the jurists are detached from the particular facts which elicited them and which formed the indispensable guides to their true import. Austin pointedly illustrates the effect of this by asking the reader to conceive a general proposition of Lord Eldon detached from the case in which it occurs, and from the careful limitations (suggested by the peculiarities of the case) with which the proposition is guarded. A collection of propositions so detached, and of which the exact import must therefore be extremely uncertain, will, he says, afford a conception of much of the matter which Tribonian and his associates inserted in the Code and Pandects as the future law of the Empire.

These considerations show that the Code and Digest of Justinian make no approach to the modern idea of a code, and that at best they are but ill-executed digests. "Instead of a statue," says Gibbon, "cast in a simple mould by the hand of an artist, the works of Justinian represent a tessellated pavement of antique and costly, but too often of incoherent fragments."

We have stated that the *formal* amendment of the law has attracted much greater notice in England than in Scotland, and in order to understand the true position of the question, it is necessary to advert briefly to the history of the movement in England.

The demand for a code may be said to have originated with Bentham. This remarkable man belonged to a school whose main desire was to break entirely with the past, and give the world a fresh start—a desire prominent in the eighteenth century, and which found its extreme vent in the French Revolution. It was thought a waste of time to consider what the laws had been in past times. What was necessary was to study the wants of the present age; to adapt the law to those wants, and express it in the simplest terms. Hence arose a demand for Codes of Law, which by their completeness should render the administration of justice a purely mechanical exercise, and by their freedom from historical associations should be equally adapted to all nations and all times.

Amongst Bentham's works will be found letters written by him when over sixty years of age to the President and People of the United States, and to the Governor of Pennsylvania, in which he forcibly points out the evils of the English Common Law of his day, and in the most disinterested manner offers to spend the few remaining years of his life in framing a code for the States. In the same collection will be found an interesting correspondence with the Emperor of Russia in which Bentham makes a similar offer to that monarch. In neither case, however, was the offer accepted. It is related that the Czar sent an autograph letter accompanied by a sealed packet containing a costly ring in acknowledgment of the generous offer. Bentham was too disinterested to accept the latter, and the packet was returned as he received it, with the Imperial seal unbroken. Money's worth as well as money, he said, was without value to him.

The constant theme of these letters is the evil of unwritten law. He calls it, "Nullis lex verbis, a nullo, nullibi, nunquam," and thus sums up his indictment of it: "Of *unwritten* (for such is the term in use) but much more properly of *uncomposed* and *unenacted* law (for of *writing* there is, beyond comparison, more belonging to this spurious than to the genuine sort)—of this impostrous law, the fruits, the perpetual fruits, are, in the *civil* or *non-penal* branch, as above; *uncertainty, uncognoscibility, particular disappointments*, without end, *general sense of insecurity* against similar disappointments and loss: in the *penal* branch, *uncertainty, and uncognoscibility*, as before; and, instead of compliance and obedience, the *evil of transgression*, mixed with the *evil of punishment*: in both branches, in the breast and in the hands of the judge, *power everywhere arbitrary*, with the semblance of a set of rules to serve as a *screen* to it."

He winds up by exhorting the American people to shut their ports against the English Common Law as they would shut them against the plague.

To remedy these evils, Bentham proposes a Pannomion or Code, the plan of which he unfolds, and which, as its name implies, is to contain the whole law. The advantages that will result from it he thus states: "All plain reading: no guess-work: no argumentation: your rule of action—your lot under it—lies before you."

There was undoubtedly much force in the criticism of Bentham, bitter and exaggerated though it often was. What has been said as to his contempt for the past, ought, however, to be borne in mind. Bentham's chief merits lay in logical analysis and classification. Incapable by nature of appreciating them, he took no account in his theories of those subtle and unseen, but not less powerful influences and processes by which rules and principles of law originate and grow with the growth of a nation's life; nor did he possess that mastery of law which is unattainable by mere theoretical study. Hence he was far from realizing the enormous

complexity of the subject and the formidable difficulties which arise when rules of even ordinary simplicity and exactness come to require application to a particular set of circumstances. The influence of Bentham has during the last thirty years to a large extent declined, partly from the causes already mentioned, partly because much has been done since his day to improve the substance of law, partly because the law has been since administered by a long race of able and upright judges, and partly because unwritten law, in the sense in which Bentham understood it, has largely diminished in extent. Law, though not less inaccessible, has become fairly settled on the bulk of ordinary subjects, and a measure of certainty may now, though only after enormous labour, be attained by a lawyer on the majority of ordinary legal questions.

The anti-historical spirit in which Bentham treated the question has since his time entirely disappeared; and a codification such as he proposed, it may be safely said, has no longer either advocates or apologists in this country.

An appreciative and finely-written article upon Bentham's proposals, from the pen of Sir Samuel Romilly, appeared in the *Edinburgh Review* for November 1817, and has been occasionally referred to in subsequent discussions on the subject.

The earlier, and indeed even yet the only practical efforts of the movement were directed to the Criminal Law alone. By the legislation of Sir Robert Peel, extending from 1826 to 1832, much was done to wipe out the reproaches of uncertainty and harshness from English Criminal Law, but little was done to improve its form. In 1833, 1836, and 1837, three different Commissions were issued, under which various reports were made. In 1845 a fourth Commission was issued, under which five reports were made. By the last Commission a Bill for consolidating into one statute the written and unwritten law relating to the definition of crimes and punishments was drawn up, which was introduced into the House of Lords in 1848 by Lord Brougham, but was not proceeded with. In 1852 Lord St. Leonards gave directions for preparing separate Bills for the codification of the Criminal Law on separate subjects, one of which, relating to offences against the person, was introduced by him to Parliament and referred to a Select Committee, of which, amongst others, Lords Lyndhurst, Brougham, Campbell, Truro, and Cranworth were members.

The following year may be regarded as a prominent landmark in the course of English law reform. Lord Cranworth, now Chancellor, in two circular letters addressed to the English judges, submitted to them the Bill last above mentioned, as amended by the Select Committee, and asked them to consider and report whether in their opinion the bringing of the whole Criminal Law, as far as relates to offences and their punishments, into one or more statute or statutes—taking the Bill as a fair specimen of the degree of precision and accuracy which it would be possible to attain—would be a measure

likely to produce benefit in the administration of criminal justice, or the reverse. The answers of the judges extend to forty-four pages of a Parliamentary paper, and are of the deepest interest to the student of this subject. They are worthy the careful perusal of many of the exact theorists who write on this subject in the present day.

The most valuable opinions are probably those of Mr. Justice (J. T.) Coleridge and Mr. Justice Talfourd. By most of the judges a consolidation of the statutes which should incorporate the results of judicial decisions and contain such amendments of the law as had been found desirable (many of which they point out) is approved and urged. The greater number of them enter into criticism of particular provisions of the Bill submitted to them and of its general frame and language, pointing out difficulties arising from inaccuracy, inconsistency, and omission, and from the involution whereby it was frequently rendered necessary to consider various clauses in combination before the effect of one could be ascertained. But the most remarkable feature of these judicial responses is this, that with one voice they condemn the proposed codification of the Common (Criminal) Law. It is shown how any change in the terminology of statutory law, such as by this proposal must necessarily occur, is inevitably followed by litigation and expense until the doubt and uncertainty to which the new law has given rise are exhausted by judicial decision. Since the legislation of Sir Robert Peel and the decisions which followed upon it, they state that the English Criminal Law has been singularly free from such questions, and they predict that many acts which are criminal and clearly fall within the principle of the rules of the Common Law will go unpunished until fresh legislation shall be supplied to meet such cases. They show forcibly that once a legal rule is expressed in the precise language of statute, its capability of adaptation to new circumstances is greatly lessened, from the strict rules of construction which must be followed, whereby doubts and uncertainty are only to be resolved by verbal criticism instead of by a reference to broad principles. Mr. Justice Coleridge thus expresses his views on this point: "I cannot conceive that language can ever be used with such precision as to meet all complications and varieties of circumstances. If you are very definite in your law, you will very often find something in the case which distinguishes it. If you are very general, you run a risk of including many things which clearly were not intended. Now, at present every judge and lawyer is aware that when you come to apply law to facts, you have ordinarily and practically more difficulty if the law be found written in a statute than if it be a portion of the Common Law. In the former case your rule is inflexible: it may be the best, in the case of a code, which one set of able and learned men can collect from the past and devise for the present, but if there be an omission you cannot supply it; if the words mean clearly one thing, you cannot call in aid supposed intention, or strong probability, or clear reasonableness, to make them say

another; if in such cases the judges strain the law, which I conceive would be clearly wrong, and their decisions prevail, a new unwritten law is gradually grafted on your code; if they do not, and you are driven to enact supplemental statutes, in that way also the very principle of your code is departed from, and gradually its supposed advantages lost."

To the same effect Mr. Justice Talfourd says: "To reduce the *Statute Law* into a narrow compass is an object entirely free from objection, and which, if accomplished with care, can produce nothing but good; but to reduce unwritten law to statute is to discard one of the greatest blessings we have for ages enjoyed in rules capable of flexible application."

With regard to the alleged superiority of a code in bringing a knowledge of the law within the reach of all, Mr. Baron Martin remarks with considerable force that, so far as Criminal Law is concerned, the ignorance of the law complained of is more specious than real; and that in truth there is scarcely any offence now made the subject-matter of indictment, and certainly none is punished, which the conscience of even the most ignorant man would not tell him was a crime.

We have dwelt at some length on these opinions—these *responsa prudentum*—because we are convinced they form one of the most important contributions ever made to this controversy. We think that although they may have lost some of their force as regards the Criminal Law in consequence of the greater definiteness and rigidity it has acquired since then, they are to a large extent unanswerable on the general question of codification; and their practical soundness is seen in the fact that although nearly thirty years have elapsed since they were written, no attempt to codify either the criminal or any other department of law has even approached success, whilst the consolidation of English Criminal Law statutes which they recommended has been carried out with the most beneficial results.

That consolidation was effected in 1861 by a number of Acts passed in that year which superseded the legislation of Sir Robert Peel. These Acts are regarded by a distinguished writer of the present day, Mr. Justice Stephen, as the nearest approach in English Law to a penal code; and whilst finding much to condemn in their structure, he eulogizes their substantial merits by stating that less than thirty decisions have been given upon their meaning by the English Court for Crown Cases Reserved, and he thinks it would be hard to find ten expressions in them which have been shown by judicial decisions to be obscure. When, however, Sir J. F. Stephen proceeds to object to them that they assume the existence of large bodies of unwritten law, we think he condemns exactly that which is the secret of their success. It is precisely this omission of the Common Law which has secured the practical utility of these Acts. In particular, they do not attempt definitions, and to this fact,

coupled with the skill with which the consolidation has been effected, are due the convenience and certainty they have produced and the trifling amount of the litigation they have evoked.

About the date at which we have now arrived, the subject of law reform was taken up by the powerful intellect of Lord Westbury. In 1860, as Attorney-General, he announced the intention of the Government to take measures for the express repeal of all the obsolete Acts with which the Statute-Book was encumbered. This great work of expurgation was duly carried out, and we have now its final fruits in a revised edition of the statutes from 1235 to 1880, with relative chronological table and index, prepared under the direction of the Statute Law Committee. In a great speech delivered in the House of Lords in 1863, Lord Westbury, then Chancellor, unfolded his plans of law reform.

Whilst giving it as his own opinion that a code was the ultimate goal to be aimed at, he admitted that the Law of England was far from ripe for codification, and his scheme was to execute simultaneous digests of the Common and the Statute Law. He proposed to revise and expurgate the reports, weeding out all decisions which are in contradiction to each other, and to cleanse out all matters not warranted by the present state of the law or applicable to the existing condition of society; and he was of opinion that the reports thus purified and refined would be reduced to a tenth of their bulk.

Similarly he proposed to weed away all those statutes that are no longer in force, and arrange and classify what was left under proper heads, bring the dispersed statutes together, eliminate jarring and discordant provisions, and thus obtain a harmonious whole, instead of having as at present, or at any rate as at that time, a chaos of inconsistent and contradictory enactments. Concurrently with this classification under heads, he hoped the corresponding parts of the Common Law extracted from the reports might be added, and in this way a digest of the whole law ultimately accomplished.

In 1866, in pursuance of the movement thus initiated, a Royal Commission was issued to Lords Cranworth, Westbury, and Cairns, Sir T. P. Wilde (Lord Penzance), Mr. Lowe (Lord Sherbrooke), Vice-Chancellor Wood (afterwards Lord Hatherley), Sir George Bowyer, Sir Roundell Palmer (Lord Selborne), Sir J. G. Lefevre, Sir T. Erskine May, Mr. Daniel, Mr. Thring, and Mr. Reilly, "to inquire into the expediency of a digest of law, and the best means of accomplishing that object, and of otherwise exhibiting in a compendious and accessible form the law as embodied in judicial decisions." To this Commission Sir J. S. Willes and Sir H. S. Maine were subsequently added.

Two reports, dated respectively 13th May 1867 and 11th May 1870, were issued by the Commissioners. In the first, after stating the magnitude of the existing evils, they gave it as their opinion that a digest, correctly framed and revised from time to time, would go far to remedy them. Being anxious to avoid any recommendation

that would involve the necessity of immediate outlay on a large scale, they suggested that a portion of the Digest, sufficient in extent to be a fair specimen of the whole, should first be prepared, from which they expected light would be thrown on many important questions—amongst others, on the time requisite for executing the whole, and the nature and extent of the authority which the Digest should have in Courts of Law.

In their second Report, which is exceedingly brief, they state that having been empowered by Government to take the steps necessary for the preparation of such specimens, they selected three subjects, viz bills of exchange, mortgage, and easement. The gentlemen to whom the preparation of digests on these subjects had been respectively intrusted, had laid before them materials of considerable value, and enabled them to form conclusions as to the conduct of the whole work. These conclusions they do not divulge, but they indicate that they deem it unadvisable to continue this mode of proceeding. They recommend that the work of a general digest, based on a comprehensive plan and with a uniform method, should be at once undertaken by Government, and that persons of the highest ability, not exceeding three in number, should, with the offer of permanent employment and high remuneration, be charged with the duty of executing it. With this recommendation the Commission ended its labours and ceased to exist.

Twelve years have since elapsed, but the Digest is yet to be commenced. During that interval several ineffectual attempts have been made to codify particular departments of law. A Bill for codifying the English Law of Evidence, prepared by Lord Coleridge (then Attorney-General) and Sir J. F. Stephen, was introduced in the session of 1873, but too late even to become the subject of discussion. In 1874 a Bill for the codification of the English Law of Homicide, drawn by Sir J. F. Stephen, was brought into Parliament by the late Mr. Russell Gurney, but did not advance beyond the stage of a Select Committee. Undaunted by these failures, and with a view to the formation of public opinion, Sir J. F. Stephen published in 1876 a digest of the Law of Evidence prepared by himself, and in 1877 a similar digest of the Criminal Law. As the production of one individual, these works must necessarily be more or less incomplete; but it is impossible to praise too highly the ability and labour expended upon them. The author himself states that the toil has been in inverse ratio to the size.

Lastly, a Royal Commission was issued in 1878 to Lord Blackburn, Mr. Justice Barry (of the Irish Bench), Mr. Justice Lush, and Sir J. F. Stephen, "to inquire into and consider the provisions of a draft code relating to indictable offences prepared for the purpose of being submitted to Parliament during the ensuing session, and to report thereon, and to suggest such alterations and amendments in the existing law as to indictable offences, and the procedure relating thereto, as may seem desirable and expedient."

This Commission reported in 1879, and with their report, which is of considerable length, and deals with the amendment both of the form and of the substance of the Criminal Law, the Commissioners submitted a code which they thought might be passed into law. The more notable features of this code are that, while aiming at exhaustiveness both of definition and provision, in various parts it expressly opens the door to the Common Law, either as to the whole of a particular branch of the code, or as to all cases not specifically provided for; and that it endeavours by a fiction to confer discretionary powers on judges in certain cases by providing that questions of fact shall be held to be questions of law. The Parliamentary fate of this code was not different from that of all its predecessors, and the only remarkable event which attended it was a long and powerful letter which it drew forth from the late Lord Chief-Justice Cockburn, who whilst professing himself an adherent of codification, says he should deeply deplore the adoption by the Legislature of a statement of the law so "imperfect and incomplete" as this code. He enters into a lengthened examination of its provisions, finding in them many difficulties, ambiguities, and omissions; and in particular he condemns *in toto* the admission in any shape or form of the Common Law, to which we have referred. This, he says, would be to make confusion worse confounded, and to deprive the Bill of all pretensions to the character of a code.

(To be continued.)

CAPACITY TO MARRY.

I.

THE principle on which capacity to enter into the marriage relation is to be regulated is still a vexed question of Private International Law. Sir R. Phillimore, after a lengthened investigation into the codes and common law of most Christian states, in the fourth volume of his great work on International Law, p. 302, thus formulates the three maxims of jurisprudence which prevail in civilized states, and which may serve as a text on which an attempt at a cursory review of the subject, within like limits, may proceed: "(1) The broad principle maintained by the United States of North America, namely, that the *capacity* of the parties as well as the formalities of the contract are to be decided *lege loci contractus* and not *lege domicilii*. (2) The principle maintained by France, and generally by the states of the European continent, namely, that the capacity of the parties is to be determined by the law of their own states, and that a marriage valid *lege loci contractus* may be holden invalid *lege domicilii* on account of the want of

capacity, though it be duly celebrated according to the *formalities legis loci contractus*. (3) The principle adopted by states which recognise the *lex loci contractus* as binding in all cases but those *in fraudem legis domesticæ*." To these may be added a fourth, exemplified by the Italian and Belgian codes, which make nationality and not domicile the criterion of capacity to do any legal act or enter into any legal relation. But as regards the nature of the questions which may arise under it, it is clear that that view may be ranked for practical purposes with Phillimore's second rule, since it merely puts nationality as the regulative factor in the place of domicile. His expression "their own states" is ambiguous, and might apply to either, were it not evident from the context that he means domicile and not nationality.

That contracts, except those affecting land, are to be judged valid or invalid *secundum legem loci contractus* is laid down in broad terms by Dirleton (*voce* Strangers) and Erskine (3. 2. 40), and is affirmed in a considerable number of early decisions. If our later law contains less direct authority on the subject, it may probably, as Mr. Westlake says of the same question on the law of England, "be referred to its not having been questioned." In his treatise on the Law of Husband and Wife (p. 1297) Lord Fraser lays down both the general rule and its special application to marriage in unqualified terms. As his Lordship, however, acknowledges in a footnote, there is no express decision on the latter point, which has to be deduced from the wider doctrine, and gleaned from the *obiter dicta* of judges on other subjects scattered throughout the reports. The most distinct enunciation of opinion is that of Lord Meadowbank in the divorce case of *Gordon v. Pye* in 1827 (Ferg. Con. Law, App. 17): "Or would a marriage here be declared void because the parties were domiciled in England and minors when they married here, and of course incapable by the laws of that country of contracting marriage?" The other *dicta* relied on by his Lordship are less definite. That of Lord Glenlee in *Rose v. Ross* (F. C.) in the same year was pronounced in a judgment on a question of legitimacy—of the effects, not the validity of marriage—which was reversed in the House of Lords, and does not now form part of the law of Scotland. The passage in Lord President Boyle's opinion in *Edmonstone v. Edmonstone* (Ferg. Div. Cases, 412) does not go beyond the rejection of the obsolete doctrine of personal law when pled as to the indissolubility of an English marriage in a suit for divorce between domiciled Scottish persons. The case of *Warrender* in 1835 (2 S. and M'L. 164), which added the affirmation of the House of Lords to the repeated decision of the Court of Session on this point, contains the opinion of Lord Brougham that the *lex loci* governs the validity or invalidity of all personal contracts, that of marriage included. But the fact that he fences his opinion by expressing a doubt whether English jurisprudence would carry it out to its logical

conclusion, that, for example, a Spanish marriage between uncle and niece, under Papal dispensation, should be held good in England, though it would expect the Spanish Courts to hold bad an English marriage between the same parties, indicates a perception of the potential difficulties which later cases have actually revealed. He repeated substantially the same opinion in *Fenton v. Livingstone* (3 Macq. 537). Lord Fraser's rule would, if logically carried out—and he carries it that length himself—involve the recognition by the Scottish Courts of the marriage abroad of a divorced adulteress with her paramour, named in the Scottish decree of divorce. On this point there is no decision, but the prevalence of expressed judicial opinion is against his view. The whole law of Scotland on the subject is really limited to a few *obiter dicta* and the unhesitating statement of an eminent institutional writer.

But if circumstances have not called for a definite solution of the problem in Scottish jurisprudence, they have led to a fruitful development of the doctrine in England in a series of decisions, in the light of which the claim of Lord Fraser, that his rule is also that of the English Courts, cannot now be regarded as well founded. When the text of his second volume was written he was able to quote in support of his view the judgment of Sir R. Phillimore in the case of *Sottomayor v. De Barros*, which had not then reached the Appeal Court. The judgment of reversal, however, is discussed and controverted by his Lordship in an appendix, with a vigour which shows that it had no effect in altering his opinion as to what the law of England ought to be, and what the law of Scotland actually is.

The case of *Male v. Roberts* (3 Esp. N. R. 163) in 1800, in which it was ruled that infancy was no defence on a contract made in Scotland by a domiciled English minor, Lord Eldon laying down that "the contract must be governed by the laws of the country where the contract arises," has long been relied on by English lawyers as the ruling case on capacity to contract in general, till its authority has been recently shaken by Justice Cotton in *Sottomayor v. De Barros*. The like sweeping *dicta*, too lengthy for quotation, were pronounced in a case of marriage (*Scrimshire v. Scrimshire*, 2 Hagg. Con. 395) half a century earlier by Sir E. Simpson, where they are based on a powerful argument for the expediency of the rule. The question was one of the validity of a marriage of English domiciled minors had in France, which was held null on the ground of want of proper observance of the forms required by the *lex loci*. The principle was further confirmed by the weighty authority of Lord Stowell in the case of *Ruding v. Smith* (2 Hagg. Con. 371) in 1821: "It is true indeed that English decisions have established the rule that a marriage valid according to the law of the place where celebrated is good everywhere else." Passages of like import might be gathered from other cases (*e.g.* *Herbert v. Herbert*, 2 Hagg. Con. 263; *Harford v. Morris*, *ib.* 429;

Middleton v. Janverin, ib. 443; *Ilderton v. Ilderton*, 2 H. Black. 145), but in none of them does the point form the basis of decision, and we are still therefore in the region of *obiter dicta*. The celebrated case of *Dalrymple v. Dalrymple*, decided by the same distinguished judge ten years previously, did indeed contain elements for a discussion and decision of the point, the husband being a domiciled English minor, marrying clandestinely in Scotland without the consent, and indeed without the knowledge, of his legal guardians. The learned judge, however, does not go beyond the question of sufficient compliance with the forms of marriage in Scotland, and makes no allusion to the defendant's lessage, except merely mentioning it. But implicitly, if not expressly, the judgment is in point. The question at length came up for direct decision in the cases of *Brook v. Brook* (3 Sm. and Giff. 481) in 1857, and *Simonin v. Mallac* (2 Sw. and Tr. 67) in 1860. The former case was finally decided in the House of Lords in 1861 (9 Clark, H. L. 193); the latter was not appealed. This was a suit for nullity of marriage at the instance of the woman. The parties were French subjects domiciled in France, who had been married in England by licence. The Code Napoléon, while admitting the validity of a foreign marriage which observes the forms of the *lex loci*, imposes on French subjects, wherever marrying, certain forms as to publication of their intention at the place of their domicile, and certain *actes respectueux* as to the consents of parents and others, even where the parties are majors, up to the age of thirty. The parties here were respectively above the ages—twenty-five for the man and twenty-one for the woman—where the consents, indispensable before these ages, may be dispensed with, after having been duly demanded, if not given within a certain time. After they had returned to France the woman sought and obtained a sentence of nullity in the French Courts on the ground of evasion of the law of domicile. She subsequently came to reside in England, and petitioned for decree of nullity there. The full Court of Divorce refused to annul the marriage. Its judgment was delivered by Sir Cresswell Cresswell, who laid down the naked principle of *locus regit actum* in its most comprehensive form, noticing, but rejecting, the doctrine of fraud on the law of domicile. "In general," he says, "the personal competency or incompetency of individuals to contract has been held to depend upon the law of the place where the contract is made." And this rule is applied to the contract of marriage in particular. He says further, "The great importance of having some one certain rule applicable to all cases; the difficulty, not to say impossibility, of having any rule applicable to all cases, save that the law of the country where a marriage is solemnized shall, in that country at least, decide whether it is valid or invalid; the absence of any judicial decision or *dictum*, or of even any opposite opinion of any writer of authority on the law of nations, have led us to the conclusion that we ought not to found

our judgment on any other rule than the law of England as prevailing amongst English subjects."

Up to this point, except as regards the case of *Brook*, to be noticed immediately, the subject had apparently been treated by English judges as if no consideration were to be taken of any other rule than that of *locus regit actum* in deciding questions as to the validity of a foreign marriage; and there is no recognition of the possibility of a distinction between capacity to marry, as a question of *status*, and the mere contractual formalities of the act.

It is nevertheless the case that nearly a century previous to this the principle of the *lex loci* had been apparently applied to capacity in direct decision by the recognition in England of the clandestine marriages in Scotland—the so-called Gretna Green marriages—of English minors in evasion of the law of England as to consent of parents or guardians. As these, however, have been explained in another way by reference to the clause in the English Marriage Act (26 Geo. II. c. 33) exempting Scotland from its operation—an explanation which seems to have satisfied the minds of English judges for many years, and of at least one English writer of eminence on International Law, till replaced by the sounder one first mooted by the Lord Chancellor in *Brook's* case—they do not properly fall into an historical survey of the subject. Of the earliest case, *Compton v. Bearcroft*, in 1769, there is no separate report, and its import has to be gleaned from references to it in the arguments of counsel and the opinions of judges in subsequent decisions, and most fully in the latest case, *Steele v. Braddel*, in 1838 (1 Milw. Ir. Eccl. Rep. 1). In the first-mentioned case it appears to have been held that the Act did not apply to Scotland, and that it could not be extended to marriages there on the principle of evasion; and the latter followed it to the effect that the Irish Act (9 Geo. II. c. 11), which was prior in date of enactment to the English one, was to be read as if it had a similar clause. Lord Fraser has claimed them in support of his doctrine, rejecting the above explanation, on an argument rather historical than legal, without noticing the later one.

In *Brook v. Brook* the question had already come up in another form. *Brook*, domiciled in England, married in Denmark (whither he had gone for the purpose, in deliberate evasion of English law, and where such marriages are lawful) the sister of his late wife. The validity of the marriage was tried in Chancery in a question between the Crown and the heirs *ab intestato* of a child of this marriage. The case has the full weight of a leading authority, for it was affirmed on appeal. The judgment in the lower Court was pronounced by Sir C. Cresswell and Vice-Chancellor Stuart, who held the marriage null under Lord Lyndhurst's Act (5 and 6 Will. IV. c. 54), which had declared marriage with a deceased wife's sister, formerly voidable by sentence of the Court, void *ab initio*. "I have therefore come to the conclusion," says the former judge,

“that a marriage contracted by the subjects of a country in which they are domiciled is not to be held valid, if by contracting it the laws of their own country are violated.” Vice-Chancellor Stuart lays down the principle of domicile in more definite terms, and directly in the teeth of the doctrine which his colleague was to enunciate in *Simonin v. Mallac* three years later: “As a question on the law of contract the validity of the contract of marriage as to the capacity to contract must depend on the law of the country in which the contract was to have its effect.” The judges in the House of Lords—Lords Chancellor Campbell, Cranworth, St. Leonards, and Wensleydale—are equally clear and unhesitating, and the combined force of their opinions lays down the principle that, if the laws of the domicile declare the marriage in essentials contrary to religion, or morality, or any of its fundamental institutions, the Courts of the domicile must hold it void wherever celebrated. The English law prohibits the *status* of marriage between such persons, being English subjects, as contrary to God’s law, morality, and public policy. To permit the *lex loci* to prevail in creating this *status* between persons having at the time, and contemplating for the future, an English matrimonial domicile, would be to render the law of England nugatory. The Gretna Green decisions were naturally advanced in favour of the marriage, and it is to be noted that, though the plea is unanimously rejected, it is so by two of the judges under reference to the limiting clause of the Act, while the Lord Chancellor disclaims this explanation, and justifies them on the ground that they involved only points of form which were not of the essence of the contract. Lord Wensleydale does not deal with the point. So it is now here for the first time that the distinction indicated by the Vice-Chancellor in the Court below between capacity and ceremony is seen to be clearly recognised and definitely stated. For while *Brook* was between the Courts, *Simonin* had been decided in the Court below, and a reconciliation had to be attempted. This is done by holding the impediments there to have been of form and not of essence, and thus throwing it into the same category with the Gretna Green cases. But in neither case does Sir C. Cresswell make this distinction part of his *media decidendi*, and certain passages in his judgment in *Simonin* are irreconcilable with any other view than that he held *locus regit actum* to cover capacity as well as form. “It is very remarkable,” he says towards the end of his judgment, “that neither in the writings of jurists, nor in the arguments of counsel, nor in the judgments delivered in the Courts of justice, is any case quoted or suggestion offered to establish the proposition that the tribunals of a country where a marriage has been solemnized in conformity with the laws of that country should hold it void because the parties to the contract were domiciled subjects of another country where such marriage would not be allowed.”

In 1859 Sir C. Cresswell had pronounced another judgment

(*Mette v. Mette*, 1 Sw. and Tr. 416), which extended the rule of *Brook* to the case where one of the parties only—in this case the husband—was domiciled in England, while the wife was domiciled in Frankfort-on-the-Main, where marriage with a deceased wife's sister is lawful. The judgment contains some discussion on the circumstance that the husband was a naturalized British subject of German origin, and some indication of opinion that nationality alone apart from domicile would have been sufficient to invalidate a marriage of the kind, but it is on the principle of domicile that the decision is based.

Brook and *Mette* must be held to mark a change of direction, and a new departure from the old course of English law exemplified in a long series of cases up to *Simonin v. Mallac*, in which the principle of *locus regit actum*, enunciated in *Scrimshire v. Scrimshire*, was applied without distinction between capacity and ceremony—the essence and the form of the contract. But the English judicial mind was here confronted with the alternative of departing from this rule, or of recognising the validity of that *bête noir* of the British moral sense, marriage with a deceased wife's sister, when the enormity is committed by English subjects in deliberate evasion of their domestic law. It then discovered the distinction between capacity to marry, as a question of *status*, and the formalities of the contract which gives rise to the *status*; and that the former should be regulated by the *lex domicilii*, and the latter by the *lex loci contractus*; though it has been left to the jurists who have written subsequently, in the light of these decisions, to refer the fresh departure to its proper footing, which, though acted upon, was only dimly expressed in the opinions of the judges. Marriage with a deceased wife's sister cannot be put in the category of those “deemed incestuous by the common consent of Christendom.”

Though it was now thus established in England that the *forum* of the domicile would insist in an incapacity imposed by the law of the domicile, but not by the law of the place of contract, the converse—that the *forum* of the place of contract would recognise an incapacity affixed by the law of the domicile, but not by its own law—was still an open question. How then should the converse of the facts of *Brook* and *Mette* occur, namely, a marriage in England, where one or both of the parties are domiciled abroad, unimpeachable as to form, but which violated the law of the foreign domicile on the head of capacity? This occurred in the two cases of *Sottomayor v. De Barros* (2 P. D. 81; 3 P. D. 1; 5 P. D. 94). Both cases were between the same parties, but were adjudicated on different facts. Two first cousins, natives of Portugal, where such a marriage is prohibited as incestuous, the disability being, however, removable by Papal dispensation, were married in England by licence. There were some additional peculiarities connected with the marriage, which would naturally induce a willingness of the Court to annul it, but none of them bearing directly on the

present question. The case arose on a petition for nullity of the marriage at the instance of the wife. The husband entered appearance, but did not file any answer. The papers were ordered to be sent to the Queen's Proctor, who instructed counsel to argue the question. By consent of parties the questions of law were heard before the questions of fact, it being alleged that both parties were domiciled in Portugal at the time of the marriage. Sir Robert Phillimore, in a short judgment, in which he shows a personal predilection for the rule of domicile as to capacity, held himself barred from granting the petition for nullity by the broad rule laid down in *Simonin v. Mallac*. On appeal the judgment was reversed, Sir Henry Cotton delivering the opinion of the Court. *Brook* was naturally pleaded by the petitioner as in principle conclusive in her favour, and it is on this ground that the judgment is based. This remarkable decision must either take rank as a leading authority marking an unmistakable turn in the current of English law, or be dropped out as a blunder. "It is a well-recognised principle of law," says the judgment, "that the question of personal capacity to enter into any contract is to be decided by the law of the domicile. . . . The law of a country where a marriage is solemnized must alone decide all questions relating to the validity of the ceremony by which the marriage is alleged to have been constituted; but, as in other contracts, so in that of marriage, personal capacity must depend on the law of domicile; and if the laws of any country prohibit its subjects within certain degrees of consanguinity from contracting marriage, and stamp a marriage between persons within the prohibited degrees as incestuous, this, in our opinion, imposes on the subjects of that country a personal incapacity, which continues to affect them so long as they are domiciled in the country where this law prevails, and renders invalid a marriage between persons both at the time of their marriage subjects of and domiciled in the country which imposes this restriction, wherever such marriage may have been solemnized."

This is opposed *toto cælo* to the broad doctrine of Sir C. Cresswell in *Simonin v. Mallac*. But the Court endeavours to reconcile the two decisions by holding with the Lord Chancellor in *Brook's* case that the impediment there was one of contractual form and not of essence. The fact of the impediment here being removable by Papal dispensation, which offered a loophole for getting rid of the incapacity, by classing it among formal impediments, though alluded to in both Courts, was rejected.

This decision, taken as complementary to *Brook*, must, until modified or reversed, be taken as ruling, that incapacity to marry, arising from a definite and essential prohibition, pronounced by the law of the domicile of *both* parties, adheres to them, wherever and by whatever forms they may endeavour to marry; and that the Courts of the place of celebration, as well as those of the domicile, are bound to recognise the incapacity affixed by the law of the domicile,

These unfortunate Portuguese cousins were not thus, however, to be set free, but were to be left, at least within the jurisdiction of English law, to repent at leisure of their ill-advised union till release should come in some other form; and to afford an illustration of the next step in the development of this interesting branch of jurisprudence. On the case being remitted to the lower Court for the determination of the questions of fact, the Queen's Proctor alleged, *inter alia*, that the parties at the time of the marriage were domiciled in England, and this was found proved as to one of them—the husband. Sir H. Cotton had already delivered a hypothetical ruling in point, on the ground that for the law of England to allow an incapacity imposed by the foreign domicile of one party to operate against the other, to whom it did not attach, would be to work injustice to an English subject. Sir James Hanuén refused to annul the marriage, but he has not accepted the above *dictum* as his basis of decision. He arraigns the judgment of Sir H. Cotton as to capacity to contract in general and marriage in particular; reviews the cases again from *Male v. Roberts* to *Simonin v. Mallac*; repudiates for Sir C. Cresswell the apology offered by Lord Chancellor Campbell and Justice Cotton for the incongruity of his judgments in *Brook* and *Simonin*; and declares for the *lex loci contractus*, to the total exclusion of the *lex domicilii*, without distinction between capacity and form.

As the first *Sottomayor* case was the converse of *Brook v. Brook*, so was the second of *Mette v. Mette*. Sir H. Cotton's reason for his anticipatory decision of the second *Sottomayor* case is lame and illogical, and has been disposed of by Lord Fraser. If domicile governs capacity to contract, and if that be the rule which, according to the principles of comity, should be administered by the tribunals of all countries, then, where one of the parties is *lege domicilii* under an absolute prohibition to marry on the ground of near relationship, lessage, or otherwise, a valid marriage is as much out of the question as if the party so circumstanced were already married to some one else. These unhappy Portuguese cousins are married in England but not in Portugal. Here it was the man who had the English domicile, but put the case that it was the woman. She is his wife in England, but when he wishes to repudiate her he goes to Portugal and sues for nullity of the marriage there. The Portuguese Courts, administering their own law, and in strict adherence to the international principle above postulated, must grant it on the ground of prohibition by the *lex domicilii*. Surely to produce such a possible result would be working greater injustice to a British subject than to leave her a spinster in England and everywhere, and at liberty to marry some one else. It is only by flinging the law of domicile overboard that the decision can be reconciled with common-sense. Then, on the elementary principle of the *jus gentium*, as well as of ordinary morality—that the Courts of one country should do to those of

another as they would be done by—if *Brook v. Brook* is right, its converse, the first *Sottomayor* decision, is right too. *Mette* is the logical consequence of *Brook*, then the second *Sottomayor* case, its direct converse, is wrong. If the rule of Cresswell and Hannen be the sound one, then the first *Sottomayor* case goes by the board, and *Brook* and *Mette* are arbitrary and unjust, and sin against the golden rule. On the principle of *Brook* the Courts of Portugal are justified in holding the marriage null, and then these parties are married in England and in Portugal are free; their children are legitimate in England and bastards in Portugal.

On turning from the reports to English writers on International Law a like development of opinion is observable following the progress of judicial decision. Burge (i. 188), writing in 1838, lays down the broad rule of *locus regit actum*: "The law of England has adopted this principle in its fullest extent. . . . This principle is applied to all questions involving the validity of the marriage, whether they respect the competence of the parties to contract or the manner in which they have contracted marriage." In support of this doctrine he refers to *Scrimshire v. Scrimshire* as expressing the law of England.

Burge however adheres to Phillimore's third rule in making an exception of a marriage abroad in *fraudem legis domesticæ*. Confronted here with the Gretna Green marriages, he justifies them by reference to the clause in the Marriage Act limiting its operation to England. His reference to authority on this head is not a happy one (*Conway v. Beazley*, 3 Hagg. Eccl. 639). The wife of Samuel Beazley (who was domiciled and married in England) obtained a divorce from the Commissaries in Edinburgh on the ground of his adultery. It is not stated where the adultery was committed, and there appears to be no report of the Scottish case. He married again in Edinburgh during his first wife's lifetime. The second wife subsequently obtained a sentence of nullity of the marriage in the English Consistorial Court. Beazley's domicile was in England throughout. Burge seems here, however, to have been misled by the rubric of the case, for the question involved is one of the validity of a decree of divorce, not one of an incapacity to marry affixed by the law of domicile. The Scottish Courts had erred in asserting a jurisdiction which they have since abandoned.

The fourth volume of Sir R. Phillimore's work, which deals with Private International Law, was published in 1874, and therefore subsequently to *Brook v. Brook* and *Simonin v. Mallac*, but prior to *Sottomayor v. De Barros*. In face of the irreconcilability, from an international point of view, of the grounds of decision in these two cases, the author limits himself to a statement of the rule of the *lex loci* as formerly the law of England—and which had culminated in *Simonin v. Mallac*—as to the validity of foreign marriages. He regards *Brook* in its true light, as not satisfactorily to be ranked in the category of marriages forbidden by Divine law,

but as an instance of a departure from the earlier rule, and an introduction of the principle of the Continental jurists that the personal law of the domicile clings to the person marrying abroad, and fixes his capacity or incapacity to do so. His own preference for this as the proper rule of the *comitas gentium*, though not definitely stated, is apparent throughout, though we have seen that as a judge he held himself bound by the opposite rule when a case occurred which was the direct converse of *Brook* in circumstances and its exact parallel in principle. It is noteworthy that, in instance of the "broad principle" of his first rule, quoted at the commencement of this article, he mentions only the United States, not England.

Three English writers have treated the subject since the decision in the first *Sottomayor* case—Westlake, Foote, and Dicey. All of them attack and reject the new doctrine of the Appeal Court in that case as to contracts in general, but accept it as far as marriage is concerned. Westlake (sec. 17) says, "It is indispensable to the validity of a marriage that the personal law of each party be satisfied so far as regards his capacity to contract it, whether absolute, in respect of age, or relative, in respect of the prohibited degrees of consanguinity or affinity;" and bases his doctrine on *Brook*, *Mette*, and *Sottomayor*. He draws the distinction between essence and form, basing it on the *Gretna Green* decisions, and rejects the doctrine of evasion.

Foote sums up his discussion of marriage as regards capacity: "Marriage is governed as to its *essentials* by the law of the domicile of the parties; as to its *forms* by the law of the place of celebration. The law of the domicile of the parties is the proper law to decide whether marriage can, by the use of any forms, ceremonies, or preliminaries, be effected." He accepts Justice Cotton's reconciliation of *Simonin v. Mallac* with this principle on the ground of the obstacle there being matter of preliminary form and not of essence; not prohibitive, but merely impeditive.

Mr. Dicey's doctrine is contained in his 44th rule, to the effect that "a marriage is valid when each of the parties has, according to the law of his or her respective domicile, the capacity to marry the other," and the conditions of the *lex loci* are observed as to form. For this he cites *Brook* and *Sottomayor*. The doctrine that consent of parents or guardians belongs to the ceremony he accepts, but characterizes it as a "logically very doubtful theory." He also, though abstaining from stating it as law, draws the logical deduction that, when one of the parties is incapacitated by the *lex domicilii*, the marriage must necessarily be invalid, which has now been upset by the second *Sottomayor* case. It is to be noticed that a like deduction is involved in the above passage from Westlake; both thus disapproving by anticipation of that decision.

I propose in a subsequent paper to review cursorily the laws of the United States and of some European countries, principally

France, Germany, and Italy, on this subject; but before leaving the law of England, there is one other case which calls for at least a reference, since it is frequently discussed and referred to in the cases already quoted. This is the *Sussex Peerage* case (11 Cl. and Fin. 85). At the death of the Duke of Sussex, who was a son of George III., in 1843, his titles were claimed by his only son, with whose mother, Lady Augusta Murray, the Duke had gone through a ceremony of marriage at Rome, sufficient, as far as concerned form, to satisfy the law of England. The Royal Marriage Act (12 Geo. III. c. 11) forbade any descendant of the body of George II., other than the issue of a princess married into a foreign family, to contract marriage without the consent of the reigning sovereign. The marriage was held invalid under the Act. This is, *prima facie*, a case of the *lex domicilii* following the person abroad and fixing his capacity, but I prefer to regard it as an exceptional case; and the disability imposed by it to be ranked with the similar ones of the Protestant Succession Act, which are applied to a limited and special class of persons for high reasons of State.

(To be continued.)

AMENDMENT OF THE CRIMINAL LIBEL.

THE well-known Act of Lord Advocate Sir William Rae (9 George IV. c. 29) effected a much-needed reform in our criminal practice, by removing various technical objections based on unimportant points of form; and thus preventing escapes from justice on frivolous grounds. An offender cannot now claim acquittal from a criminal charge because a careless officer has failed to affix his signature to each page of the service copy of the libel (*Robert Boyach*, murder, 2 Hume, 248); or because when citing witnesses he omitted to carry on his person the warrant authorizing him to cite them (*John Proudfoot*, murder, Patrick Shaw's Justiciary Cases, No. 96); or because of a clerical mistake in a letter in the name of the judge—D. Bayle instead of D. Boyle—copied at the end of the list of assize in the copy libel served by him (*Alison's Practice*, p. 319); or because of a mistake in the number of a street in the designation of a witness, unobjected to till remedy was too late, after the jury were sworn (*Bernard Kean*, P. Shaw's Cases, No. 47); or because of the jury omitting to retire before delivering their verdict against a prisoner who had pleaded guilty in their presence (*William Wood*, 2 Hume, 427); or because of the jury in their written verdict inaccurately using the word theft instead of robbery (P. Shaw's Cases, No. 21). The officer does not now require to sign more than the notice of compareance at the end of the libel; he is no longer required to carry the warrant of citation on his person when citing

witnesses; the copy signature of the judge at the list of assize in the prisoner's copy is dispensed with; objections to designations of witnesses require now to be stated before the jury are sworn, when remedy is still possible; the jury do not now require to receive the prisoner's plea or to retire before delivering their verdict; and written verdicts are not now necessary. But since Sir William Rae's time our practice has been and still is marred by technical acquittals on grounds not more pertinent than those above stated. We find, for example, a prisoner accused of murder dismissed from the bar and declared to be free from further prosecution, because of such a trivial omission as a copy of the prosecutor's signature in the service copy of criminal letters, the want of which could not possibly prejudice him, but which the Court held he was entitled to have, and yet could not supply by amendment (case of *John Cameron*, High Court, January 1850, J. Shaw, p. 295). We further find two convicted murderers set at liberty, without sentence, because, in certifying the case from a Circuit Court to the High Court, to consider an objection to a certain production which had been admitted during the trial, the Clerk of Court had inadvertently omitted to enter in the record a diet for proceeding with the case—the Court holding that the instance had thus fallen, and that they could not therefore proceed further (case of the *Frasers*, 1852, Irvine's Reports, p. 1, etc.).

We desire at present, however, to deal with a fruitful source of objections,—not within the scope of Sir William Rae's Act,—fatal in many cases, arising from want of a power to apply a sound principle of amendment to our severely technical form of libel. Such objections arise in three forms: first, to the relevancy properly stated at the outset of the case, when they are not necessarily fatal, since a new libel may be raised; second, to some formal defect appearing on the face of the libel, but kept *in retentis* till after the jury are sworn, when remedy is impossible and a disastrous result must necessarily follow; and, third, to trivial discrepancies between the facts proved and those averred in the libel, which also result fatally. We shall endeavour to show, by reference to various such cases, that in regard to the first and third forms of objection, it would be a wholesome improvement in our practice to adopt the natural course of *amending* the libel to cure such objections; and, otherwise, to receive no objection to a merely formal defect after the case is in the hands of the jury.

The first class of cases on objections to the relevancy resolve into two branches—objections to the minor, and objections to the major propositions of the libel; the former being the more frequent, as the major is unassailable unless some innominate crime is charged. The first case we cite under the first branch is that of *Buchanan* (P. Shaw's Justiciary Cases, p. 121), in which the charge was for exposing an infant child. In that case the *locus delicti* was thus libelled: "Within a field or park called Bannaty Mill

Park, on the farm of Bannaty Mill, then and now or lately possessed by John Swan, farmer, in the parish of Strathmiglo and county of Fife." This description was objected to as insufficient, the situation of the farm being said not to be stated, and that it might have been a hundred miles from the residence of the possessor of it, and not even within the jurisdiction of the Court! This very critical objection—which a simple transposition of the words would have obviated, the farm being in point of fact in the parish named—was sustained, and a new libel had to be raised to get the description of the *locus* amended, thus causing considerable delay in the disposal of the case.

At the Perth Circuit Court, October 1853 (*Wilson*, 1 Irvine, p. 302), a man was charged with various acts of falsehood, fraud, and wilful imposition on the *species facti* that he wrote from Edinburgh to various persons at a distance, and induced them by false representations to forward to him goods which he received and appropriated, without paying or intending to pay therefor. The libel was objected to and held irrelevant because the *locus* of appropriation was not set forth. The addition of a few words would have obviated the objection, and supplied the information which the prisoner desiderated; but the diet was deserted to admit of a new libel being raised.

In the recent case of the *Dunkeld Bridge Rioters* (1 Couper, 169) the indictment was found irrelevant because it contained no direct averment of the Duke of Athole's right to levy pontage. The fact was nevertheless notorious, and it was not disputed even by the counsel for the prisoners, that the Duke, by himself and his predecessors, had been in use to levy pontage under an Act of Parliament since the time of George III. In dealing with the question of relevancy, however, the Court said they had nothing to do with matters of fact, and could not look beyond the libel; and that, judging by that limited standard, the Duke's toll-gate and collector's box indicated an *illegal obstruction* on the bridge, the violent removal of which was therefore no crime. This technical victory was merely temporary, and served only to delay proceedings for a time, the addition of the required averment being made in a new libel, which was raised and prosecuted to a conviction. But how much simpler and more creditable to our practice would it have been to have found the remedy in allowing the libel to be amended by supplying the technical omission.

In the case of *Elizabeth Kerr* (3 Irvine, 627) for the murder of her infant child, five days old, by leaving it exposed in a ditch of water, the Court held the libel irrelevant on the ground of ambiguity in the use of the word "exposure." There was a popular as well as a technical use of the word, the latter implying desertion, but the Court could not adopt the latter construction without a distinct averment, or a statement equivalent thereto. In point of fact the child had been deserted, and the addition of a few words directly stating so, and that it had been left to die from such desertion and

exposure, would have removed the doubt felt by the Court; but the usual elaborate process of deserting the diet and raising a new libel had to be resorted to before the defect could be remedied.

Such are a few illustrations of objections to the minor proposition, objections some of which, however critical and technical, were, it may be thought, fairly enough raised on the statements of fact averred by the prosecutor on which he proposed to prove his case. But when we come to deal with objections to the major proposition in charges of innominate offences, we find indictments cast on the relevancy—though the facts narrated in the minor were sufficient to support criminal charges—because the prosecutor, in dealing with a crime for which he had no direct precedent, failed so deftly to frame his major as to lay down a proposition unassailable by hostile criticism, and which, in all circumstances, and under every possible condition, sets forth a charge undoubtedly criminal. Lord Mackenzie, no doubt, in the case of *Maitland* (1 Broun, p. 62) held that the major proposition “need not exclude offences which are not indictable, provided it includes those which are;” and the Solicitor-General in the recent case of *Clendinnen* (December 1875, 3 Couper, 176) maintained a similar view; a criterion of decision which, if followed in practice, would have removed a fertile source of objection; but by numerous decisions it is quite settled that the major proposition must stand or fall on its own terms, and cannot be supplemented, qualified, or restricted by reference to the minor. The following are a few cases in point, judged by this severe test, in which objections were sustained to the major.

Before the Dundee Circuit Court, April 1868 (1 Couper, p. 28), two men were charged with “the wickedly and feloniously administering to or causing to be administered to or taken by any of the lieges, jalap, or other purgative, or other noxious substance or thing whereby they are put in danger of their lives, or are injuriously affected in their health or persons.” The Court, on objection to the relevancy, eliminated from the proposition the words *wickedly and feloniously*, denoting the quality of the act, holding that they gave no force or efficacy to the charge. The major being thus emasculated and reduced to its lowest alternative, simply amounted to a charge of causing to be taken by any of the lieges, a purgative, whereby they are injuriously affected in their persons; and such a charge, without any allegation of malice, or of wilful and culpable administration, the Court held did not amount to a crime, because it did not exclude the innocent administration of a drug as a medical prescription! A reference to the minor proposition would indeed have shown that the *modus operandi* fully justified the allegations of *culpa* desiderated by the Court, and have negatived any intention on the part of the prosecutor to indict the accuseds for a legitimate act of administering medicine; the allegation being that they had wilfully given their victim the noxious drug disguised in a quantity of rum-and-porter, whereby he was seized with vomiting

and purging, and put in danger of his life. But the minor proposition was not to be looked at to explain the major, nor could the major be amended, and the prisoners were consequently dismissed from the bar.

Before the High Court, November 1868 (1 Couper, p. 123), the master and mate of a vessel were charged, *inter alia*, with "cruel and barbarous usage by persons exercising command or authority in a British ship, especially of boys of the age of twelve or thereby or other tender age." The Dean of Faculty objected to this major proposition, contending that it might include mere acts of discipline towards seamen or conduct towards a pirate! The Court suggested further illustrations of cruel and barbarous usage which might come within the scope of such a general proposition, for example, a husband lacerating his wife's feelings—and a ship captain treating a female passenger ignominiously, etc.; and it was said that these could not have been held criminal without the element of physical violence; and as the major did not include that charge, it could not be sustained. There was certainly abundance of room for such a charge upon the facts of the case as laid in the minor; which set forth that the vessel having sailed from Greenock on a voyage to Quebec, and several boys having stowed away or concealed themselves in her before she sailed, the panels did, on repeated occasions during the voyage, cruelly and barbarously maltreat them, and did withhold from them necessary food and nourishment, which they were well able to supply, so that the boys were almost famished; that the prisoners put the lads in irons, and struck and kicked and beat them with their fists and with ropes; that they stripped them naked when the weather was cold and frosty, and exposed them in that condition on the deck of the vessel, and poured snow and cold water on their naked bodies, and otherwise abused them whereby they were subjected to great pain and suffering. There was no charge of cruel treatment to seamen or pirates; no case of want of consideration for the feelings of a wife or lady passenger; but such a shocking case of inhuman treatment of young boys as Lord Mackenzie would have held included in the major a serious crime. Admitting, however, the major to be unskilfully framed and defective, according to general judicial opinion, the case was, we submit, eminently one in which a reasonable power of amendment would have cured the proposition by the addition of a few words, thus facilitating the course of justice and saving all reference to those imaginary creations introduced into the argument by the counsel and Court.

The case of *Michael Hinchy*, who was charged before the Circuit Court, Perth, September 1864 (4 Irvine, 561), with (1) the wicked and felonious fabrication of false accounts with intent to defraud, and (2) uttering the same with the like intent, was, we think, one of the most signal failures of justice to be found in modern practice. On an objection to the relevancy, the introductory sting of the major expressing the quality of the acts charged

was extracted, the Court holding, in effect, that the prosecutor could not make a bad major good by merely using adjectives. The term "false account" was also objected to and held to be ambiguous, the prisoner's counsel contending that it might apply to a mere error in addition or multiplication. The Court dwelt at some length on the proposition that the mere fabrication of a false account was not a completed criminal act; that the law dealt only with overt acts, and had nothing to do with the intentions of a person or with his secret actions; and apposite illustrations were given of a man fabricating nefarious documents, but keeping them in his desk, and of a false account for a dishonest purpose being framed, but put into the fire after a short existence of five minutes or five seconds. But the answer to all this was that the prosecutor did not intend to maintain, and did not maintain, that the mere act of fabricating false accounts or receipts was *per se* a crime. On the contrary, the libel was framed on the analogy of forgery and uttering forged documents—forgery not being a crime unless followed by uttering; such a form being used to meet the case of a verdict being found for the uttering only. If Michael Hinchy had kept his false accounts in his desk or put them into the fire, he would not have come within range of the public prosecutor, which official charged him, not with fabricating merely, but with uttering false accounts with fraudulent intent. This branch of the major, however, was also found insufficient, because the false documents were not said to be forgeries, the Court being of opinion that the charge amounted in substance only to telling a lie, which could not be converted into a crime by being put in writing; or, in other words, that the charge amounted only to a mere attempt to commit fraud; which was not a crime by the law of Scotland. Now, in contrast to this criticism and judgment on the majors, let us look beyond these abstract propositions and see what crimes the indictment charged against Hinchy. The minor propositions set forth at great length (the libel being over sixty pages) that, in his capacity of chief constable of Forfarshire, he, being bound to render true accounts of charges and expenditure in criminal business, payable by Exchequer, had fabricated and rendered to the officials of that department, with intent to defraud them, a false account for the period of one year, containing upwards of one hundred false entries for work never performed and for outlays never incurred; and that he had, with the connivance of a hotel-keeper, fabricated and uttered upwards of thirty false accounts for hires charged in the general account, all as set forth at length. The documents, it is true, were not forgeries, as desiderated by the Court, and there was no completed fraud libelled, though, on that ground, the accused could claim no merit, he having done all that was necessary on his part to make the fraud complete. The acts set forth were novel and did not fall under any fixed *nomen juris*, but it cannot be seriously doubted that they contained criminal matter for which it

was surely possible to frame a relevant libel; and if the prosecutor failed in so dexterously stating the major proposition as to be legally unobjectionable, why not adopt the reasonable course of amending it? It is said that we have an advantage over our neighbours across the Tweed, inasmuch as our criminal law has native vigour and elasticity to enable our supreme judges to declare any act of an obviously criminal nature to be criminal though not previously the subject of decision, and to punish offenders in such manner as they think suitable to the case. Under this elasticity principle our judges have dealt with such offences as the keeping of a gaming-house (case of *Greenhuff and others*, High Court, December 1838, 2 Swinton, 237); uttering a false certificate by a prison surgeon as to the health of a prisoner (case of *Gibson*, High Court, May 1848, Arkley, p. 489); fabricating and uttering false writings (not forgeries), to be made use of in a sequestration for the purpose of a pretended creditor voting and acting as a true creditor (case of *Brooks, etc.*, Glasgow, December 1861, 4 Irvine, p. 132); fabricating and uttering false writings for the purpose of procuring sequestration (case of *Walker and others*, Glasgow, September 1872, 2 Couper, p. 329); and vitiating and altering a receipt for money with intent to defraud, and uttering the same (case of *Hutchison*, 2 Couper, p. 351). It will surely not be contended that such acts are not more obviously criminal than the acts of an official, especially an officer of the law whose duty it is to put down crime, attempting to deceive and "rob the Exchequer" by the elaborate means above set forth. It is one of the startling anomalies of our practice that judges having something like legislative power to declare and deal with new criminal matter, do not seem to have the power to amend or look beyond a major proposition which they hold to be faulty.

If the major proposition in the case of crimes having *nomina juris* were to be judged by the same excessive strictness as in innominate offences, various objections might be successfully urged. We have so long used a stereotyped form of proposition that we are scarcely sensible of its inaccuracy in describing various crimes which it is made to fit. We aver, correctly enough, that murder is "a crime of a heinous nature, and severely punishable;" but when we apply the same form of proposition to culpable homicide, it is often manifestly inaccurate, because many such acts involve only a slight degree of blame, and are punishable by a mere short imprisonment or fine. The same may be said of assault and theft, many of these offences being trivial and punished slightly; and *a fortiori* the proposition is not true of breach of peace, the lowest crime in our practice, but which is libelled in the same portentous way as murder. Moreover, we charge all crimes in the major as contrary not only to our laws, but "the laws of every other well-governed realm," a proposition which is untrue in every case of incest or attempt to commit that crime, which we try, since neither in England nor in any other realm, well or ill governed (so far as

we know), beyond our own, are such acts liable to be dealt with criminally. Speaking generally, a major proposition for a crime having a recognised *nomen juris* is unnecessary for any practical purpose. There can be no dispute that culpable homicide, assault, theft, etc., are crimes, though their heinousness and degree of punishment may admit of doubt. And to require a major in *innominate* offences is to raise a barrier, often insuperable, to the consideration of the facts of the case. Our syllogistic form of libel is, in fact, pedantic, prolix, and unnatural as a legal instrument, and has ever been a prolific source of objection and technical escape. Our practice would be vastly improved by its abolition and the introduction of a simple form in which the facts could be dealt with at once on a plain narrative averring the crime submitted for trial. But while the objectionable form remains, let us, at all events, have a power to amend it when found defective, and proceed with the trial when all is prepared for it, and cease our irrational practice of throwing out a libel on some fanciful and theoretical objection to the major, while the minor contains substantial averments of facts undoubtedly criminal, and while an amendment of the major would put the accused under no disadvantage.

But, to return to *Hinchy's* case: the indictment against him contained other charges than those mentioned, showing that he had actually defrauded the Exchequer by fabricating and uttering other false accounts, such charges being libelled under the *nomen juris* of falsehood, fraud, and wilful imposition, to which no objection was or could be taken in point of relevancy. These charges being, however, mixed up with the attempts to commit fraud, the prosecutor wished to bring the whole case under the view of the Court. When, therefore, the indictment was cast on the relevancy to the attempts, he did not think it his duty to go on with the successful frauds alone, but presented a petition to the Court stating his intention to raise a new libel for the whole charges, and craving that Hinchy should be committed to prison till criminal letters were prepared and served upon him, *that* being the only course competent in the circumstances, as the accused was "running his letters" under the Act 1701. The Court, however, adopted the very rare, if not unprecedented, course of refusing to give any deliverance or to write upon the petition, and the panel was liberated from the bar. He shortly afterwards left the country, so that the prosecutor was unable to bring him to justice, and thus ended, in a lamentably impotent manner, a case the preparation of which had involved much labour, and which was not unreasonably expected to reach at least a trial on the merits. The soundness of the judgment by the Court on the relevancy may well be doubted, if compared with previous and subsequent cases; but, without raising that question here, we humbly contend that the case referred to forcibly illustrated the necessity of a power to amend

the libel, if it did not show cause for the utter *abolition* of the syllogistic form. Under such an amending power, the Court, by the addition of a few words to the majors, could have obviated the objections which they considered fatal to the relevancy in the cases before cited.

So much for objections to the major proposition. Under the head of objections to formal defects stated after remits to the jury, two cases may be referred to. In the case of *Cameron* or *Mathieson* (2 Irvine, 445) for theft, the usual averment of previous conviction at the end of the minor proposition was, by mistake, omitted, in consequence of which proof of the convictions was objected to, and they were withdrawn. While the prisoner's counsel, in the interests of his client, refrained from stating the objection till it was past remedy, it ought to have been raised *in limine* and against the interlocutor of relevancy, for the libel was not relevant so far as the aggravation of previous convictions was concerned. Had the omission been noticed at the outset, and the convictions been thought important, the diet might have been deserted and a new libel raised with the omission supplied. In accordance with the usual mode of libelling, the fact of the convictions was stated, first, in the major proposition; second, in the commencement of the minor proposition under the "verity" clause; and the convictions were set forth *seriatim* in the latter part of the libel among the writs to be produced in evidence; so that the omission to make a fourth reference to the convictions was of the most technical and formal character, and such as ought properly to come within the scope of a power of amendment.

At the autumn Circuit Court, Inverary, 1850, a man accused of cattle-stealing was brought to the bar, and having pleaded not guilty,—the usual interlocutor of relevancy being pronounced,—was remitted to the knowledge of an assize. It was then objected that the jury could not take cognizance of the crime in respect in the "all which" clause of the libel these usual words, viz. "*being found proven by the verdict of an assize,*" had been omitted. It was answered for the prosecution that the objection came too late, and should have been stated to the interlocutor of relevancy remitting the panel to the assize. The Court, however, held the objection good, and that it was not too late; and the panel was assolized *simpliciter* and dismissed from the bar (*M'Neillage*, Shaw, p. 459). The objection, as in the last case, was known to the panel's counsel before the relevancy was sustained, and if it had been then stated the case would have been delayed and a correct libel served. Counsel for the petitioner candidly admitted in argument that he was fully sensible of this, and as he was entitled to take advantage of every formal slip in favour of his client, he purposely refrained from stating the objection till remedy was impossible. The case well illustrates the necessity of a power to amend.

manufacturing confectioner. One of the charges was for stealing thirty-three casks or barrels each containing sugar [and sugar-dust] or sugar-sweepings, or a mixture of [sugar-dust or] sugar-sweepings. The Advocate-Depute moved the Court for permission to delete the words in brackets in order to obviate a difficulty which he felt might arise on the evidence as to the precise contents of the barrels. The counsel for the prisoners objected that such deletion would alter the substance of the charge; and the Court sustained the objection, the diet being deserted *pro loco et tempore* and the prisoners recommitted. The crime was a *furtum grave* and therefore not bailable; but on account of the delay thus caused in the preparation of a fresh libel with an amended description of the sugar mixture, the prosecutor consented to bail being taken, on a renewed application by the prisoners. They were accordingly liberated, and the result was that they absconded from justice by leaving the country, sentence of outlawry being pronounced against them for non-appearance. With all respect to the judgment of the Court, we are unable to see any force in the objection sustained in this case. The distinction between sugar-dust and sugar-sweepings seems akin to the difference betwixt tweedledum and tweedledee. The proposed deletion would have left the charge substantially one of stealing sugar, a portion of it being in the shape of sweepings instead of dust.

A modified measure of reform in the way of amending the libel was introduced by the Summary Procedure Act of 1864, sec. 5 of which enacts that "no objection shall be allowed by the Court to any complaint under this Act for any alleged defect therein in substance or in form, or for any variance between any such complaint and the evidence adduced on the part of the prosecutor or complainer at the hearing thereof, not changing the character of the offence charged; but if any such objection or variance shall appear to the Court to be such that the respondent has been thereby deceived or misled, it shall be lawful for the Court to adjourn the hearing to some future day, and at the same time, or at any stage of the proceedings, to direct such amendment to be made upon the complaint as may appear to be requisite, not changing the character of the offence, and such amendment shall be authenticated by the signature or initials of the Judge or Clerk of Court." A liberal interpretation of this enactment would prove beneficial in obviating such objections as arise under the third class above stated, as to time, place, etc.; and we believe it has to a certain extent been useful in the minor practice to which it applies. But in some quarters the old rigid rule still obtains, notwithstanding the statutory relaxations. Take a single case in illustration. In 1878 (case of *Callendar*, 4 Couper, p. 120) a man was charged under the summary procedure form before the Sheriff at Linlithgow with night-poaching on certain fields on various farms, the names of the fields and farms and the occupants and proprietors thereof

being specifically set forth. Evidence was led which established the trespass on the particular farms libelled, but as the prosecutor had not proved the names of the fields, the Sheriff intimated that he must hold the complaint not proven. The procurator-fiscal thereupon moved for leave to amend the complaint by striking out the names of the fields, but the Sheriff refused to allow this to be done at "so late a stage of the proceedings, and as being too great a change in the terms of the libel;" and the prisoner was accordingly acquitted. The judgment of the Sheriff having been brought by appeal before the High Court, the Lord Justice-Clerk indicated an opinion that the complaint would have been relevant without any specification of the fields; that such specification was superfluous and did not require to be proved; an opinion which seems applicable to the Fife case, where the reference to the parish was admittedly superfluous. But this opinion of his Lordship lost much of its force by his remarks on the question of amendment. His Lordship's judgment on this matter was somewhat timid; he "rather thought that the complaint did not require to be amended, but that if it did it was too late at the stage proposed" by the prosecutor. No doubt, according to the practice previous to the passing of the Summary Procedure Act, amendments by way of deletion were only competent before the proof was entered upon; but if the amendment proposed in this case came within the scope of the section of the Act quoted, under the forms of which Act the complaint was raised, such amendment was competent "at any stage of the proceedings."

In order to the Summary Procedure Act being really useful we require a more liberal interpretation of the amending clause, and an extension of such power of amendment is necessary to crimes of more serious character than can be dealt with under a summary complaint. The Law Commissioners, in their report a few years ago, made a step in the right direction when they suggested that amendments might be made by *addition* as well as deletion of words, before the evidence was entered upon, if the prisoner consented or the Court were satisfied that no prejudice could result to the defence thereby; though they did not see their way to allow more important amendments to cure discrepancies arising on the evidence, because they thought this would lead to carelessness in the preparation of indictments! This fear on the part of the Commissioners is, we humbly think, not well founded. In the various cases above cited in which variances occurred on the evidence, we do not think the prosecutor could be held seriously blamable, and no blame was alleged. No doubt prosecutors, though brought up in a school of severe accuracy, are liable to make mistakes as well as other people; but they cannot be held liable for the mistakes of witnesses, to which the failures of justice in at least some of the above cases were due. But even if a prosecutor is so careless of his reputation as to be guilty of manifest acts of carelessness,

surely there is a more appropriate remedy than the acquittal of the prisoner.

Lord Campbell in 1851 obtained for England such a measure of criminal law reform as we urgently want in Scotland. The preamble of his Lordship's Act (14 and 15 Vict. c. 100) describing the former condition of English practice, fitly describes the present condition of our own, in these terms: that offenders frequently escaped conviction by reason of technicalities in matters not material to the merits of the case; that such technical strictness might safely be relaxed so as to ensure the punishment of the guilty without depriving the accused of any just means of defence; that failures of justice often took place on criminal trials by reason of variances between the statement in the indictment and the proof of names, dates, matters, and circumstances not material to the merits, and by the misstatement of which the prisoner could not have been prejudiced in his defence. It was therefore enacted (sec. 1) that all such variances might be amended during the trial, and that the proceedings should go on as if no such variance had occurred, the Court, however, having power to postpone the proceedings if considered necessary. The Act had, moreover, another wholesome provision (sec. 25) for preventing objections to formal defects on the face of the libel after the jury were sworn: all such had to be fairly stated at the outset, power being given to amend them.

This excellent statute has happily effected a salutary change in English practice. Where, in consequence of variance between the evidence and the facts libelled, an amendment is necessary, it is usually made before the prosecutor closes his case, after which the counsel for the prisoner addresses the jury on the indictment as amended. The Court have, however, generally given the statute so liberal an interpretation, that where, for example, property has been laid in the wrong person, the indictment has been amended even after counsel for the prosecution had addressed the jury and closed his case (*Reg. v. Fullarton*, 6 Cox, C. C. 194).

We have thus in Lord Campbell's Act an excellent model for the correction of our practice by relaxing the forms and rules of procedure with which we have fettered ourselves, and which, intended to be beneficial, have been hurtful to the ends of justice. Let us obtain a corrective power to amend our forms to suit our facts when such can be done without unfairness to the prisoner, keeping in view the essential point in all criminal trials, the question of guilt or innocence, looking more to substance and less to form, and bearing in mind that as an acquittal not on the merits is an acquittal contrary to justice, so it should be contrary to law.

NOTES IN THE INNER HOUSE.

IN the case of *Aytoun v. Stoddart* (February 4, 1882, First Division) we have the question raised, What is to be considered a fictitious entry in an account made to elide the application of the Triennial Prescription Act? In a lawyer's account the following were the items in consequence of which it was sought to exclude the operation of that Act: "Attendance as to payment of rent now due, £0, 0s. 0d.; to postages and incidents, £0, 10s. 0d." They were under date 16th May 1878, and appeared in the account as rendered in August of that year. The action was raised on 14th May 1881 in the Sheriff Court of Edinburgh. The Sheriff-Substitute found them insufficient to bar the operation of the statute, and the Sheriff, after allowing a proof, adhered. Upon appeal the Court of Session reversed. The following remarks appear in the judgment of the Lord President: "Has this account been made up by contrivance to elide the plea of prescription? The best answer to that question consists in the pursuer's showing that in the account he rendered for the same services in August 1878, within three months after the death of his client, these two items were included in exactly the same manner as they now stand in the account here sued for. The sum thus charged may or may not be recovered in this action. That is not the question before us. The question here is, whether this appears on the face of the account to be a fair and *bona fide* entry or a mere trick to elide the statute. I have no hesitation in saying that it is not the latter, and accordingly, judging as I do, merely with reference to the plea of triennial prescription, I am of opinion that that plea is not applicable." This case may be compared with that of *Stewart v. Scott* (February 28, 1844, 6 D. 889), in which the Court rejected the items founded upon to elide prescription. The character of these items appears from the following observation of the Lord Justice-Clerk, who says, "If after an account is presented as it stands in the agent's own books, and therefore held in law to be paid, he shall be allowed from recollection and loose papers in his possession to add charges for accidental matters out of the course of regular business, in order to bring the account within the years of prescription, and then too to be supported by *ex post facto* entries of similar charges in former years, when none were actually made in the books, with a view to give the air of greater plausibility to the operation, we must see that the law of the statute will be easily evaded in such cases."

Under the head of *expenses* we note the following cases. In *Fleming v. North of Scotland Banking Company* (February 21, 1882, First Division), the Court, who had at a previous stage of the case decided that an appeal from the Sheriff Court involving the question of expenses alone was competent, having come on the merits to decide against the appellants, found no expenses due to

either party, the success having been divided because of the unsuccessful attempt to exclude the appeal.

In the case of *Macdonald v. Simpson* (March 7, 1882, Second Division) a poor woman in receipt of parochial relief sought damages on account of the death of her husband. The defender founded upon the case of *Hunter v. Clark* (1 R. 1154), and pleaded that as she did not sue *in formâ pauperis* she was bound to find caution. *Hunter's* case was decided by the First Division, and in giving judgment the Lord President said, "It is a strong thing to say that a pauper who does not choose to take the benefit of the poor's roll, and in so doing, to establish that she has at least a *probabilis causa litigandi*, is to be entitled to sue without finding caution for expenses." He suggested that she avoided the reporters on *probabilis causa* because she was unable to satisfy them. Accordingly time was allowed to the pursuer to enable her to apply for the benefit of the poor's roll. The authority of this case seems to have been virtually set aside by the judges who decided that of *Macdonald*. Lord Rutherford Clark, who could see no distinction between them, nevertheless concurred in the opinion that Macdonald should be allowed to carry on her action in the ordinary way without caution. Lord Young's opinion can hardly be reconciled with that of the Lord President. The former said, "To send this case to the reporters *probabilis causa* when the pursuer does not wish to have an agent and counsel given to her, in order to determine whether she has a probable cause of action, and if she has a probable cause of action, to allow her to litigate, and if not, to prevent her from litigating, is a course of procedure which I do not think we can sanction. It would require a special Act of Parliament to authorize us to do so." Possibly special legislation would be necessary to compel a litigant to adopt the poor's roll, but surely the Court are entitled to say, If you don't adopt it, we must take steps to protect the interests of the defender. As long as there are agents and counsel of—well, we shall say a speculative turn of mind—cases will be raised with little or no foundation. It is desirable to ascertain the precise amount of foundation before great expense has been incurred by a defender which never can be recovered by him. Lord Craighill's opinion seems to have been based upon the nature of the action, damages for the loss of a husband whose death had made the pursuer a pauper. Actions of this sort, however, are very frequently groundless.

In the *Magistrates of Leith v. Gibb* (February 3, 1882, First Division) parties who had been unsuccessful tendered the taxed amount of expenses under deduction of the expense of moving for approval of the Auditor's report and decree. The defender, the successful party, declined this tender, and argued before the Court that the motion was necessary to enable him to extract the decree in his favour. The Court, however, held that the tender was sufficient, and deducted the expenses of approval and decree, which

were in their opinion unnecessary for the purpose sought by the defender. This decision is in conformity with that of *Allan v. Allan's Trustees* (July 1, 1851, 13 D. 1270).

In deciding the case of *Hoggs v. Caldwell* (February 25, 1882, Second Division), in which it was pleaded that the defender should find caution for expenses, the Lord Justice-Clerk remarked, "I have always been averse to closing the mouth of a defender by ordaining him to find caution. I do not say that there are not circumstances in which that is not the right course, but it is always undesirable to put a man in such a position." The defender in this case was a tenant who was pleading in defence against a landlord's sequestration for rent, that he had not got possession of certain subjects let by verbal agreement after the written lease had been entered into. This the Court held to be an illiquid claim not relevant as a defence to such an action.

The question of the Sheriff's power in cases of aliment granted to wives came up in *Hay v. Hay* (February 24, 1882, First Division) under the following circumstances. A husband and wife had been separated by interlocutor of the Lord Ordinary, who had awarded to the latter £40 of aliment. Subsequently to the separation a child was born, and the wife went to the Sheriff with a petition against her husband for the expenses of her confinement and for additional aliment for the child at the rate of £12 per annum for the period of ten years. This the Sheriffs granted, treating the case apparently as if it had been one of filiation. Upon appeal the Court, while approving of the decree for inlying expenses, held that the inferior judges had gone wrong in granting aliment for a number of years. The Lord President said, "No doubt one difficulty common in such cases is absent here, for separation has been granted by the proper Consistorial Court. But still there is a difficulty in the Sheriff's dealing with the matter except as an interim arrangement, for in all questions between husband and wife the Consistorial Court is the proper *forum*, and the Sheriff can only interfere in cases of immediate necessity. . . . It is indispensable that every decree of this sort should bear on the face of it that it is merely *ad interim*, and a decree for ten years is not so; and I think that no term should be fixed but this, that aliment shall go on in the meantime, but be terminable by any event which shall take the burden off the mother in any way. In regard to the amount, I think the Sheriff has been too extravagant. The wife has been already granted £40 per annum out of her husband's income, which is little more than £100 a year."

In *Stevens v. Stevens* (March 15, 1882) the Court held that a wife in an action against her husband of separation and aliment could not plead that his cruelty was *res judicata* in respect of evidence led by her as a defender in previous proceedings at his instance, but that she was bound to lead proof afresh. The Lord Ordinary in this case was Lord Fraser. "It may," he said, "be an

important fact for her to prove in this action of separation that she defeated her husband's demand for divorce on the ground of desertion, but that will not free her from the necessity of establishing substantially her right to demand judicial separation.

We note several cases relating to factorial appointments. In *Smith* (February 10, 1882, Outer House) a judicial factor who held funds for behoof of certain life-renters and fiars, having upon the death of two of the life-renters paid over the sums thus set free to the fiars, obtained a decree of exoneration and discharge *ad interim* from the Lord Ordinary. In *Murphy or Collins v. The Eglinton Iron Company*, and *McGregor v. Caledonian Railway Company* (February 2 and 22, 1882, Second Division), the Court was called upon to appoint judicial guardians to parties in whose favour verdicts awarding damages had been returned. In both cases they did so without insisting upon petitions being presented in the Outer House after the usual fashion, but after hearing a verbal motion made to that effect in the single bills. This was done to avoid expense to the parties, the sums in question being small. Judicial factors were reminded by Lord Kinnear (Ordinary) the other day of a somewhat ancient Act of Sederunt relating to their office. By A. S. 13th February 1730 a factor failing to lodge "a scheme of his accompts, charge and discharge," with the clerk to the process is "liable to such a mulct as the Lords of Session shall modify, not being under a half-year's salary." In *Roxburgh and others* (March 17, 1882) this minimum penalty was imposed upon a defaulting factor.

Under section 46 of the recent Sheriff Court Act it is provided that "a person carrying on a trade or business, and having a place of business within a county, shall be subject to the jurisdiction of the Sheriff thereof in any action, notwithstanding that he has his domicile in another county." Does a party who merely as judicial factor realizes moveable estate become liable to the jurisdiction of the Sheriff in whose county the owner of that estate resided? In *Ferguson v. Dyer* (February 25, 1882, Second Division) this question was raised. The defender acted as judicial factor upon the estate of a deceased farmer. The Sheriff of Lanarkshire, reversing his Substitute, decided the question in the affirmative. But the Court of Session returned to the judgment of Sheriff Birnie. Lord Rutherford Clark said, "It is quite possible that a representative in order to realize may carry on the business of his predecessor. But to realize is not necessarily to carry on the business. To sell the effects and ingather the debts of a deceased trader is not to carry on his business. If it were so, every representative or trustee of a deceased trader must carry on business, a proposition which in my opinion is not well founded either in fact or law. The statute is not intended to transfer to a successor any of the qualities which belonged to his predecessor. The jurisdiction is created over the individual himself. It is not confined to any particular state, but it is universal."

UNSATISFACTORY EVIDENCE.

THE result of the experience which a lawyer acquires with regard to the conduct of mankind when called upon to exercise the important social duty of giving evidence is very far from being satisfactory. We are perfectly sure that any barrister or solicitor whose practice has afforded him sufficient opportunities of observation would upon reflection admit that the amount of downright perjury committed in Courts of justice is very great indeed; and, in addition to cases of "flat" perjury, there are a still larger number of cases in which witnesses, more or less consciously, exaggerate or garble the truth. There is, no doubt, an almost inevitable tendency on the part of those called on to give evidence to piece in the details of a partially-remembered occurrence or set of occurrences. The process of trying to recollect in such a case gives rise to a number of conjectures or theories, which gradually usurp in the mind the position due to actually-remembered facts; and, again, a degree of recollection far short of absolute certainty is very apt to harden into positive statement in the heat of excitement or of resentment caused by a cross-examination insinuating doubts as to the witness's accuracy or credibility. Not to be quite sure of anything which one nevertheless in some measure asserts, is felt to be a derogatory position. There is a certain amount of weakness involved in taking such a line, and so, under a hostile suggestion of doubt, people are frequently driven over the line which separates perfect truthfulness from mixed truth and falsehood. Nothing is commoner than for a witness in examination-in-chief to qualify his statement with some expression importing that he is not absolutely certain, such as "I believe," or "to the best of my recollection." He is then cross-examined, and, under the influence of questions which really impute no more uncertainty than the witness-in-chief voluntarily expressed, he gradually gets surer and surer, till at length, being asked, in accordance with the procedure common in such cases, whether he will "swear it," he replies with much vehemence that he will. It is a common thing to find witnesses professing to be able to speak to the details of conversations and transactions which took place a year or so back, and that in cases where there was nothing peculiar in the nature of the thing so as especially to impress the mind. Let any one of our readers endeavour to recall the details of some conversation, even of an important nature, that took place a year and a half ago, or even a few months ago, and we think he will probably find it very difficult actually to remember them, though he may have a more or less firm belief as to the general import of what passed.

To take another instance in which evidence is peculiarly apt to be unreliable from somewhat similar causes: A matter which, in criminal trials, frequently becomes the subject of discussion is the

identification of persons, and we have a strong opinion that very great numbers of the community are wholly destitute of a sense of the responsibility which attaches to evidence of this sort. Evidence of identity is often given with a positiveness which under the circumstances seems astonishing. We think it is probable that uneducated persons, whose life experiences are somewhat narrow, may have a keener memory for the faces of those who on trifling occasions are brought in contact with them than those whose experience is broader and who deal more with abstractions. A busy professional man does not notice particularly the personal appearance of the driver of the hansom that he hails for the purpose of being conveyed to chambers. It is very probable that the cabman may notice the hirer's countenance more particularly, forming thereupon perhaps a judgment as to whether he looks like an extra sixpence or not. But still we cannot help doubting whether people in general notice so particularly and remember so well the persons whom they casually encounter for a very brief space as one must suppose a great many people to do from the way in which evidence of identification is often given. There are a good many causes tending towards rash and unreliable identification, such as, for instance, conceit, love of the marvellous, a wish to be mixed up with sensational matters, an honest but injudicious eagerness to forward the cause of justice. In a certain trial, in which the evidence of identity conspicuously failed, statements were made by one or two of the witnesses which very forcibly illustrate the way in which evidence of identity may be vitiated. The procedure ordinarily followed by the police in such cases is to put the accused person among a number of others and see whether the witness can identify such person. One of the witnesses, who had in the first instance failed to identify the accused, stated, by way of explanation, that the bold and unconcerned demeanour of the accused had led him to think that she could not be the person. This statement is most suggestive of the possibility of error in such cases. It is obvious that this witness was endeavouring, not to identify in the proper sense of the term, but to select one out of the number of persons before him by a wholly illegitimate test. It is very difficult to say how the witness may most safely be tested, but it is obvious that the usual course adopted is not free from danger. The mischief is that the witness knows that one among the persons submitted to him is an accused person. He is expected to identify some one and seeks to bring to the aid of memory other *indicia* than those which it furnishes. A person whose mind is disciplined by education ought to be able to resist this tendency; a person who should consciously yield to it would be guilty of a grave moral offence, but undisciplined and impulsive persons may perhaps be, to some extent, pardoned if they confuse together *criteria* which ought to be kept entirely distinct.

There can be no doubt, on the part of the practical man as well as the moralist, of the great importance of impressing on the community, in all ways which may be available, the sacredness of the duty involved in giving testimony. The oath which, from the most ancient times, has been imposed on the witness is both the expression of the character of the duty involved and an attempt to ensure its fulfilment. We question whether the oath, as now administered, adds as much as it is sometimes thought to do to the sense of obligation felt by the witness, though it may perhaps have some effect. There can be no doubt of the very considerable influence that may be exercised, and no doubt is often exercised, in this matter by conscientious professional men in the performance of the function of taking the evidence in preparing for any legal proceeding. A person engaged in getting up evidence must necessarily have it in his power, to a large extent, to minister to, or to restrain, the tendency on the part of a witness to deviate from, or improve upon, the truth. Great experience, tact, and a high sense of duty are all needed in order, on the one hand, to do justice to a case, and, on the other, not to induce any paltering with the truth on the part of witnesses. We have no doubt that in many cases these qualifications are forthcoming, but in some we fear they are not. Again, the influence of judges in this matter is obviously very great, and we are afraid that sometimes, though of course unconsciously, the course they take tends to drive a witness over the line of strict veracity. The judge is, after all, mortal; he has got to take a note, and he wishes to take a clear one. For this purpose he sometimes drives a witness into being clearer than the witness has any right in conscience to be. Nothing is commoner than for a witness coming to speak to a conversation after a long interval of time, to say only that the import of it was so and so. The judge immediately asks what was said, and requires the very words so far as the witness can remember. This he does, no doubt, on the principle that stating the general result of conversations is hardly evidence, and would be open to abuse, but the inevitable result is that the witness is driven to try to mould his recollection of the general import of what passed into a conversation, which, after the lapse of so long a time, he is not really able to do with perfect truth. The result is that his evidence becomes an artificial production, something like the speeches which Thucydides puts into the mouths of generals and statesmen. We doubt whether it would not be safer and better on the whole to take all that the witness can truthfully give, viz. his general recollection of what took place. The absence of detail would be matter which would go to the weight of the evidence. We do not mean to say that a judge is not right in challenging in a judicious manner general statements as to the results of conversations, but to insist on a witness always giving a conversation, so that it may appear in the "direct oration" on the judge's notebook, seems to us to be contrary to natural possibility.

We are afraid that witnesses whose consciences are tenderly scrupulous often get scant consideration in Court. They are a source of trouble to the judge, whose temper is perhaps sorely tried by stress of business. It often ends in their being suspected of shuffling by the judge, and accused of it by the opposing counsel. The imperturbable witness, who is as bold as brass, who is quite sure, and who has his story quite pat, has a much better time of it. He may often be a great liar, but he gives much less trouble to the judge and jury and all parties concerned, except perhaps the counsel on the other side.—*Solicitors' Journal*.

Correspondence.

(To the Editor of the Journal of Jurisprudence.)

ATTORNEY CERTIFICATES.

SIR,—I wish to make a remark on the statements in "Law Agent's" letter, published in your March issue, on attorney certificates. Your correspondent seems altogether to forget that the Legislature have, by the Acts they have passed barring entrance to the legal profession, created a monopoly for those who gain admission to it; and that law agents are only paying the price of this monopoly in the shape of admission duty and annual licence. As to the amount of the licence duty, it seems to me to be too low.

A. L. J.

Obituary.

ROBERT MACDONALD, Esq., S.S.C.—The summer session of 1882 opens with some blanks and familiar forms no longer in our midst. A well-known face in the person of Robert Macdonald, S.S.C., who died on 28th April last, in the fortieth year of his age, will be one of those who will be sadly missed. All too soon a life apparently full of promise and long usefulness has been brought to a close, and a career which was ever one of honour and increasing professional prosperity has been cut short. Coming from the county of Dumbarton with little to recommend him but an honest face and willing hands, Mr. Macdonald, twenty-two years ago, entered the office of Mr. Murdoch of Leith, and after the usual curriculum in law and office attendance, he was in 1870 admitted a member of the Society of Solicitors before the Supreme Courts of Scotland, having two years previously, "ing to changes in the firm of his then ageing master, Mr. Murdoch,

been assumed as his junior partner, and to the close of his life Mr. Macdonald was the representative of the firm best known in the Courts where much of its business was done. To a thorough knowledge of his profession, combined with good judgment, a kindly and courteous manner, and a capacity and love for hard work, must be largely attributed that success which led his firm to add an Edinburgh office to that long established in Leith, and to rank among the agents having the largest business in the Supreme and Sheriff Courts. His practice lay much in maritime causes, and in this class of cases his mature experience and advice will be greatly missed; but his own and his firm's name will be longest associated with the case of *Muir and others (Murdoch's Trustees) v. City of Glasgow Bank* (1879), the trustees' test cause, which resulted in issues so disastrous to the large body of trustees throughout the country, but which was admirably conducted and well fought, the Lord President in giving judgment observing, "This is a case of very great and general importance. It has been argued on both sides of the Bar with unusual ability and elaboration." To his unwearied care and application to this and other cases perhaps may be attributed the early death of this accomplished and able practitioner, adding another name to the now long roll of men who with no outward circumstances to recommend them, by dint of honesty, common-sense, a courteous manner, and hard work rise to the front rank of their profession and leave behind them a fragrant memory. Of Mr. Macdonald's private life much good might be said. Married to the daughter of the Rev. Dr. Macdonald of North Leith, the Moderator of the Free Church Assembly of this year, he faithfully discharged the duties of an elder in the church of his father-in-law; and his love of and care for the young was evinced by his unwearied labours in connection with his church for children, some hundreds of whom took part in the funeral services at his grave. Useful and honoured in his profession, loved and missed in his private life, Robert Macdonald will long be held in affectionate remembrance by his clients for his unwearied and patient attention to their interests, and his name revered by his legal brethren for his uprightness of conduct, brotherly love, and professional culture and ability.

THOMAS IVORY, Esq., Advocate.—We regret to have to record the death under very painful circumstances of this gentleman. Mr. Ivory was called to the Bar in 1851, and though never attaining a large practice, obtained a fair share of business. He was much esteemed for his amiable disposition, and took a leading part in many philanthropic schemes. At the time of his death he was Counsel for the Woods and Forests Department.

The Month.

A Dead Man coming to Life again.—Mr. Justice Harrison, with a city common jury, had before him on Thursday, May 4, an extraordinary case. It arose out of an interpleader issue in reference to the ownership of certain property seized in March last under an execution at the suit of Christopher Nowlan against Thomas Kelly. The plaintiff carries on the business of a victualler in Camden Street, and the defendant was a farmer residing in the County Dublin. It appeared that Nowlan had lent a sum of £50 to Kelly, and the latter failing to repay the debt had proceedings taken against him. A notice to the effect that Kelly was dead was served on Nowlan, but the latter, believing the statement to be untrue, continued the action, and having obtained a decree seized the defendant's property. The defendant's son-in-law, Patrick Nowlan, however, claimed the goods seized, alleging that he had purchased them. The present issue was consequently directed to try the ownership in the property.

Mr. Teeling, in stating the case for P. Nowlan, said that there were only two points involved in the case—firstly, whether Patrick Nowlan had, as alleged, purchased the property, and whether Thomas Kelly was dead at the time these proceedings were commenced. The plaintiff alleged that Thomas Kelly was then and is still alive, and he denied that there was any *bond fide* purchase by Patrick Nowlan. Counsel said it would be proved by several witnesses that Thomas Kelly's death took place on the 1st of January in the present year, that he was afterwards buried in a graveyard at Glencullen, and that a number of persons living in the district attended his funeral.

The plaintiff was examined, and deposed that he purchased the goods for £16, and he also stated that he was aware Thomas Kelly was dead. He attended the wake, and saw the corpse, which was afterwards buried at Glencullen.

Thomas Marrin also gave evidence as to the purchase of the goods by the plaintiff. He knew an undertaker in Winetavern Street from whom they purchased a coffin for deceased for £1, 12s. Witness got 1s. commission on the transaction from the undertaker. The coffin had a breastplate, with the name of the deceased and his age, "72 years," engraved on it.

Margaret Kelly, widow of the "deceased," deposed that her husband died very suddenly, as she believed from bronchitis. He had not been visited by any doctor.

This closed the plaintiff's case.

Mr. Murphy, Q.C., stated the defendant's case, and characterized the case made for the plaintiff as a conspiracy and fraud. It would be shown that Thomas Kelly was still a living man. He was 'bly reminded by this case of one of Lever's novels, in which it

was stated that a gentleman who was in distressed circumstances, fearing that his person would be seized, got it reported that he was dead, and went through a mock funeral to escape his creditors. One of the earliest cases Lord St. Leonards had to decide when he came to this country as Lord Chancellor was an administration suit of a gentleman who was supposed to have died intestate. The case lasted several days. Witnesses had proved the man's death, but towards the close of the case a gentleman in Court got up and asked permission to make a statement. Lord St. Leonards asked who dared to disturb the Court? The gentleman replied, "My Lord, I am the intestate." That case still remains in the books, but there had been no decision yet on the point as to whether or not an intestate had a right to appear in his own behalf. He would produce evidence for the jury to prove beyond all doubt that Thomas Kelly was still a living man.

Dr. Mackey, registrar of the district in which Kelly resides, gave evidence to the effect that Kelly's wife offered him £2 for a certificate of her husband's death, which, of course, he refused to give.

The Rev. Mr. Boland proved that Mrs. Kelly called on him, and insisted on getting a certificate of her marriage, which occurred forty-two years ago, the object being to have it described in the certificate that she was a widow, and that her husband was now dead. He refused to give her the certificate.

Mrs. Donnelly, wife of an undertaker in Winetavern Street, stated that Mrs. Kelly and her son had purchased a coffin and breastplate, on which the name of the "deceased," the date of his death, and his age were inscribed.

A witness named O'Connell swore that he saw the supposed deceased alive a few weeks since at a place called Oldtown, in the County Meath.

Other witnesses also deposed to the fact that deceased was still alive.

Mr. Justice Harrison at this stage said he felt bound to ask plaintiff's counsel whether they hoped to succeed, and if they intended to push the case further?

Mr. Teeling, after some consultation, said that having regard to the evidence which had been adduced, he thought it was hopeless to continue the proceedings.

The jury then found a verdict for Christopher Nowlan on all the issues raised.—*Solicitors' Journal*.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriffs THOMAS and SPITTAL.

CAMPBELL (WITH CONSENTS) v. METHUEN AND COMPANY.

Pledge or sale of fishing-boat—Mercantile Amendment Act, 1856, 19 and 20 Vict. c. 60, sec. 1—Effect of recent decision of House of Lords, M'Bane v. Wallace, 27th July 1881.—The circumstances of this case appear from the interlocutors.

"*Wick, 10th March 1882.*—Having considered the process and heard parties' procurators, Finds (1) that early in 1880 John Young, fisherman, got the boat Ergo, WK. 479, built, and registered said boat at the port of Wick on 21st April 1880, John Young being entered in the certificate of registry, 23 of process, as owner and also as master of said boat; (2) that John Young fished with said boat for Methuen & Company during the season of 1880; (3) that on 6th September 1880 John Young and his brother Benjamin Young entered into the agreement, 21 of process, with Methuen & Company, represented at Wick by James M'Kenzie, whereby, *inter alia*, they acknowledged themselves to be due Methuen & Company the sum of £19, 19s. 11d. sterling, and bound themselves to fish for Methuen & Company at Pulteney during the ensuing season ending 6th September 1881, on the terms and conditions set forth in said agreement; (4) that at the time of entering into said agreement John and Benjamin Young asked an advance of £70 sterling, which sum James M'Kenzie, on behalf of James Methuen & Company, agreed to give them, on condition that they gave over their boat Ergo in security of their debt and the said advance; (5) that thereupon there was written on said agreement the clause, 'We to receive the sum of £70 now to account, for which we register our boat in your name until paid,' which was then signed by John Young and Benjamin Young; (6) that at same time John Young signed this clause, indorsed on the certificate of registry 23 of process, 'I, the undersigned, acknowledge the boat Ergo, WK. 479, to be the property of James Methuen & Company, fishcurers, Leith;'; (7) that John Young thereafter received from Methuen & Company the stipulated sum of £70 sterling; (8) that the certificate of registry, 23 of process, was retained by M'Kenzie, who on 22nd November 1880 obtained a new certificate of registry of the boat Ergo, in which James Methuen & Company were entered as owners and John Young as master of said boat, the words 'cancelled on change of ownership' being at same time written on the former certificate of registry, 23 of process, which was thereafter retained in the Custom-house of Wick; (9) that during said season of 1881 John and Benjamin Young incurred to the pursuer Campbell an account for groceries amounting to £13, 1s. 1d. sterling, and at the close of said season obtained from him an advance of £20 sterling to pay wages of hired men; (10) that at the end of the fishing season of 1881 John and Benjamin Young were due Methuen & Company the sum of £71, 7s. 6d. sterling, as shown in Nos. 7 and 16 of process; (11) that on 8th September 1881 a meeting of creditors of John and Benjamin Young took place in the office of the Wick and Pulteney Ropery Company, on which day John and Benjamin Young signed the document 36 of process authorizing William Auld Sinclair to take possession of the boat Ergo and her materials on behalf of their creditors; (12) that on 31st October 1881 John Munro, in the employment of Methuen & Company, hauled and berthed the said boat, and was paid by them therefor; (13) that on 7th November 1881 John and Benjamin Young signed the document 37 of process consenting to the sale of the said boat Ergo by William Auld Sinclair for behoof of their creditors; (14) that on 7th January 1882 the pursuer Campbell arrested the said boat Ergo at or near Port Dunbar Harbour,

Wick, and that said boat has since been advertised for sale by William Auld Sinclair: Finds that Methuen & Company have not consented to said boat and materials being taken possession of or sold by Sinclair or any one representing John and Benjamin Young or their creditors, except upon the condition of their (Methuen's) claim against the Youngs being first satisfied: Finds in point of law that the defenders have a real right of pledge in the boat Ergo and her materials, and that the pursuers are not entitled to interfere with the same without consent of the defenders: Sustains the defences: Refuses the prayer of the petition and decerns: Finds the defenders entitled to expenses, an account thereof to be lodged, and when lodged remits the same to the Auditor of Court to tax and report, and decerns. CHARLES GREY SPITTAL.

"*Note.*—I am of opinion that this case must be decided according to the law of pledge, and consequently that the numerous authorities cited for the pursuer do not apply. It is not without hesitation, however, that I have come to be of this opinion, for the case presents peculiar features, and I have not been able to find any reported case precisely in point.

"In the ordinary case of pledge, a moveable subject is delivered to the creditor in security of debt, to be detained by him until the debtor shall redeem it. On the debt being paid, the thing pledged is restored to the debtor. The debtor remains the true proprietor of the thing pledged, burdened, however, by the debt in security of which the pledge is constituted. If the debt be not paid, the creditor may retain the pledge; and he may apply for a judicial warrant to sell it for satisfaction of the debt.

"The other creditors of the debtor, the owner of the thing pledged, can only attach his reversionary right in the thing pledged. Stair says (1, 13, 11), 'There being a real right of the pledge, no other diligence will affect it further than as to the reversion of it, on payment of the creditor's debt.'

"Bell in his Principles defines pledge as 'a real right completed by delivery and possession, which delivery can be given effectually only by one having the ownership or disposal. This, with continued possession of the thing pledged, are necessary to the creation and continuance of the real right in the pledge.'

"Now, in the present case the Youngs were undoubtedly owners of the boat Ergo in September 1880 when they got the advance of £70 from Methuen & Company, and it is equally clear that they intended to give some sort of right to Methuen & Company over their boat Ergo until their debt should be paid. In short, I think they intended to pledge the boat in security of the debt. A pledge to be effectual requires delivery. Did they deliver the boat to Methuen & Company? The pursuer maintained that they did not, and that Methuen & Company never had possession of the boat. There is no doubt a little difficulty here, owing to the nature of the subject pledged, but I think the true view of the case is that the boat was delivered.

"The subjects usually given in pledge are subjects like silver-plate, clothes, jewels, title-deeds, etc., which can be bodily handed over to the creditor, and retained by him in his house or warehouse. A fishing-boat cannot be so handed over. It naturally and necessarily remains either in the water during the fishing season, or drawn up on shore at some place appropriated for that purpose when the fishing season is over. But the Youngs gave their certificate of registry of the boat to the Methuens, consenting in writing that the boat should be registered in Methuens' name until the debt was paid, and the boat was accordingly actually so registered. I think this was meant to be, and really amounted to, 'delivery' of the pledge, and it is not easy to see what other 'delivery' could be.

"No doubt the Youngs continued to fish in the boat, and this among other things just shows that the case, owing to the nature of the subject, is not an ordinary case of pledge; for in the ordinary case the thing pledged remains unused in the custody of the creditor, and Bell says that the creditor has no right to use the thing pledged during his possession of it.

"But at the time when this pledge was constituted, it was part of the bargain that the boat should be used, for the Youngs were to fish in it during the ensu-

ing season. This was an accommodation to the debtors to which they were not entitled, but I do not think that it withdraws the case from the category of pledge, and the argument that it does so comes with a very bad grace from the Youngs. At the end of the season of 1881 the Youngs' debt was still unpaid. Had they regained 'possession' of the boat, or had Methuens ceased to 'possess' it? I think not. Methuens still held the certificate of registry. The boat itself lay for some time in Pulteney unused and unoccupied, until in the end of October, the usual hauling-time, it was hauled and berthed by the Methuens at Wick. Before that, in September, there had been a meeting of Youngs' creditors, and the Youngs had signed the document 36 of process authorizing Sinclair to take possession of the boat and materials, and Sinclair did accordingly take the boat's materials, and store them in the Ropery Company's stores.

"But I do not think the Youngs were entitled to give such authority to Sinclair.

"The Youngs say in their evidence that they consider themselves all along, and still, owners of the boat, and therefore entitled to do with it as they choose. I think their first proposition is sound: they are owners of the boat, but under the burden of their debt to the Methuens, and I think the boat is still legally in 'possession' of the Methuens.

"The evidence of the Youngs is not very satisfactory. John Young tried to get over the effect of the writing on the agreement and the certificate of registry, admitting that he signed the writing, but saying that he was not aware till now of the terms of it. While Benjamin admits his signature, but says, 'We never gave the boat for that money.' I don't think this can be accepted from them as at all qualifying their written agreement. There is no doubt, I think, that they were fully aware at the time that Methuens only gave them the advance on the footing of the boat being pledged in security.

"The pursuer Campbell says he would not have given money to the Youngs had he known that the boat did not belong to them, and that he 'understood' all along that it was their boat. Sinclair says that at the meeting of creditors on 8th September it was 'understood' that the boat was the property of the Youngs, but no one asked them about their property in the boat. And I do not think it is proved that either of the Youngs even said to Campbell that they were owners of the boat. An 'understanding' that a boat belongs to a fisherman is not worth much. This case is very much one of misunderstanding. I think if a merchant gives goods or cash to a fisherman he should have something more to go upon than an 'understanding' that the fisherman is owner of a boat.

"Had Campbell asked to see the boat's certificate of registry, he would at once have become aware of Methuens' claim over it and of the Youngs' qualified right of property. Probably he would not then have been so ready to accommodate the Youngs with goods and cash.

"The case of *Couper v. Matheson and Ross*, decided in this Court in November last, resembles the present case in this, that Ross in paying off Methuens' debt to Methuens got the boat registered in his own name as owner, Matheson's name being entered merely as master. But in that case Matheson subsequently sold the boat out and out to Ross, and the case was decided on the ground that at the date of Couper's arrestment the boat was the property of Ross.

"On the whole, therefore, I am of opinion that the conditions of pledge have been sufficiently satisfied in this case, and that the defenders are entitled to retain the boat until their debt is paid, or to apply for a warrant to sell the boat, the pledgers being called as parties to the action. C. G. S."

An appeal was taken by the pursuers, and after a debate at the Sheriff's spring sittings he pronounced the following interlocutor:—

"*Wick, 1st April 1882.*—The Sheriff of consent of parties Allows the defenders to amend their first plea so as to raise a case for sale as well as of pledge: And heard parties, Recalls the interlocutor of 10th March last submitted to in so far as regards the finding in point of law: Finds instead, that

by a contract of sale on 6th September 1881 John Young, the then owner of the boat *Ergo*, transferred the said boat and her appurtenances to the defenders, who now have the custody of the same in whole or in part, and that the defenders are entitled to hold the said boat and appurtenances as their property until repaid the sum of £70 and interest by the pursuers, John and Benjamin Young : Of new refuses the prayer of the petition and decerns : Finds the defenders entitled to expenses up to 7th February last : Finds the pursuers entitled to expenses from 7th February to 10th March last : Remits to the Auditor to tax these expenses : And *quoad ultra* finds expenses due to neither party.

“GEO. H. THOMS.

“*Note.*—Both parties agreed on the facts as found by the Sheriff-Substitute. But the defenders, besides claiming this to be a case of pledge as at the discussion before the Sheriff-Substitute, now argued alternatively that it was a case of sale, where the possession was allowed for a time to remain with the sellers, to which the first section of the Mercantile Law (Scotland) Amendment Act of 1856 (19 and 20 Vict. c. 60), as interpreted by the House of Lords in *M'Bain v. Wallace & Co.*, 27th July 1881, applied. The Sheriff has given effect to this argument. In this view the question of possession after the sale was of no moment, and hence the alteration of the Sheriff-Substitute's finding as to expenses.
G. H. T.”

Act.—Sutherland.—*Alt.*—Cormack.

MACKENZIE v. MANAGERS OF U.P. CHURCH IN PULTENEYTOWN.

Lease—Conditional authority to lease exceeded—What rei interventus.—This was an action to obtain entrance to a house which it was alleged the defenders had let to the pursuer, and the Sheriff-Substitute pronounced this interlocutor :—

“*Wick, 24th March 1882.*—Having considered the process and heard parties' procurators, Finds—(1) that on 21st December 1881 Mr. Hector Sutherland wrote, and on the following morning sent, to 'Mr. Alexander Malcolm, fishcurer, Pulteneytown,' the letter No. 13 of process, wherein, *inter alia*, he stated that he had a client who would be willing to take 'The Manse,' meaning the manse belonging to the United Presbyterian congregation in Pulteneytown, for six months from 1st January, and asked an answer as to whether the proposal was likely to be entertained, and what would be the terms ; (2) that at a meeting of the managers of the United Presbyterian Church held on 27th December, Mr. Sutherland's letter was read by Mr. Malcolm ; (3) that the managers after some deliberation resolved in the first instance to have certain repairs, which had been in contemplation for some time, executed on the manse, Mr. Malcolm, the chairman, being empowered to treat as to the letting of the manse after the repairs were done ; (4) that some days thereafter Messrs. Malcolm, Manson, and Bruce, all managers of the United Presbyterian Church, called at the office of Mr. Hector Sutherland and had some conversation with him as to the letting of the manse ; (5) that thereafter, on 2nd January 1882, Malcolm again called on Mr. Sutherland, who wrote and signed the letter No. 10 of process addressed to Mr. Malcolm, and offering on behalf of Mr. John Mackenzie, pursuer, to take the United Presbyterian Manse for six months from 1st January current at a rent of £1 per month, writing also after his signature the *addendum*, 'I beg to agree to this on behalf of the managers ;' (6) that Malcolm signed the *addendum*, adding, 'We will get repairs completed as soon as possible.' Finds that this letter or missive is not binding on the managers of the United Presbyterian Church, defenders in this process, they never having authorized Malcolm so to let the manse or to sign any such document on their behalf, and that it does not confer any right on the pursuer to occupy the manse or to have possession of the keys thereof : Dismisses the petition and decerns : Finds the defenders entitled to expenses, allows an account thereof to be

lodged, and when lodged remits the same to the Auditor of Court to tax and report, and decerna.

CHARLES GREY SPITTAL.

"*Note.*—I think the evidence shows that the managers, while they contemplated letting the manse for a limited period, fully resolved that it should not be let until after the repairs were done. Malcolm was undoubtedly authorized to 'treat' as to the letting after the repairs were done, and perhaps he might, before the repairs were done, have 'treated' on the footing or condition that occupancy was not to be had until the repairs were completed. But on 2nd January the repairs were not even begun, and Malcolm not only 'treated' as to the letting, but signed a document importing that he let the manse. He says he 'never let the manse with entry before the repairs were completed,' apparently meaning that under 10 of process the pursuer would have the privilege of paying rent from 1st January, while he might never be troubled by having to occupy the manse at all, if the repairs were long of being finished. But I can see nothing in the document of 2nd January to bind the managers. They never sanctioned it in any way. Quite the contrary. I think the pursuer was rather rash in concluding that that letter gave him a legal right of occupancy. The case is in fact full of misunderstandings. How the pursuer and his agent could 'understand' the result of the visit of Murray and Stewart to pursuers in January to be that pursuer was to get the manse, I cannot see. They could hardly get that impression from the copy of the minute of 27th December which was given to them at that meeting. I do not think that the question of the charter, of which so much was made, has any bearing on the case, and the question of the keys is also a very small matter, not affecting the real point at issue. Certainly the manner in which the pursuer obtained possession of the keys cannot be construed as conferring upon him any legal right to occupy the manse as tenant. I have not proceeded on the minutes of the managers, as it appears to me they are not legal evidence. The only one competently introduced into the process is that of 27th December, a copy of which was handed to the pursuer in January by the deputation. C. G. S."

This judgment was on 1st April 1882 affirmed by the Sheriff (Thoms) on appeal with additional expenses.

Act.—Sutherland. — *Alt.*—Sutherland.

SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

WALKER'S TRUSTEES v. LENNOX.

Lease—Bankruptcy of tenant—Future obligations.—*Held*, that where a tenant becomes bankrupt during his lease, and occupies till the expiry of the current year, the landlord's remedy is to claim in the sequestration, and against the defender personally, if he has been discharged on a composition, for his loss; but that, as the sequestration cuts down the obligation, though not the right to continue tenant, if the tenant gives up the lease the landlord cannot sue an action for rent against him. The pursuers in this case were the trustees of the late John Walker, hairdresser and perfumer, Glasgow, and they claimed from the defender, Duncan Lennox, of Steel's Hotel, the sum of £92, 10s., being two half-years' rent of premises in Argyle Street occupied by the hotel, the pursuers reserving their claims against the defender for the rent to become due during the succeeding nine years of the lease.

The facts are fully detailed in the Sheriff-Substitute's interlocutor, which was as follows :—

"The Sheriff-Substitute having considered the cause, Finds that in March 1868 the defender took on lease for ten years as from Whitsunday 1880 the premises mentioned on record belonging to the pursuers at the rent of £92, annuum, payable by equal instalments at Martinmas and Whitsunday :

Finds that the defender entered on possession of said premises under his lease and continued in occupation till 21st May 1881 : Finds that in July 1880 his estates were sequestrated, but that on 15th November 1880 said sequestration was declared at an end, and a judicial discharge was granted to him of the debts and obligations incurred by him prior to his sequestration on a composition of four shillings in the pound, and he was reinvested in his estates : Finds that the trustee on the defender's sequestrated estates did not take up or deal in any way with the lease entered into as aforesaid between him and the pursuers : Finds that on 19th November 1880 the defender, in consequence of frequent pressure by the pursuers for payment of his rent and under fear of sequestration by them, paid them the sum of £22 and promised to pay the balance as soon as possible : Finds that on 30th November 1880 he paid them the further sum of £24, 5s., being the balance of the full amount of the rent specified in the lease, and received from the pursuers' factor the receipt, No. 16 of process, discharging the rent due at Martinmas 1880 : Finds that the defender on 1st April 1881 gave notice to the pursuers that he did not intend to continue in occupation of the premises after the ensuing term of Whitsunday, and that he removed therefrom on 21st May 1881, but that prior to said 1st April he gave no notice to the pursuers whether he intended to avail himself of the tenancy provided by the lease or to abandon it : Finds that on 27th May 1881 the pursuers obtained warrant of sequestration against the defender's effects for the rent specified by the lease as payable at Whitsunday 1881, and in security for the rents to become due at the terms of Martinmas and Whitsunday following, but that no effects could be got to be inventoried, as the defender had removed them : Finds that the effects so removed were of the value of about £20 : Finds that the defender has not paid any rents other than the sums paid by him in November 1880 as above mentioned : Finds, as matter of law, (1) that by his sequestration and his declinature to continue tenant the defender was relieved of the obligations incurred by him to the pursuers under his lease ; (2) that in respect thereof the pursuers were entitled to claim in the sequestration for the amount of the year's rent, under deduction of the value of the hypothec, and for the loss they could instruct they were likely to suffer through the defender's breach of contract in regard to his lease ; (3) that the defender having been discharged on a composition is liable personally as well as his sequestrated estates to the extent of the composition on the unsecured portion of the rent due to the pursuers ; (4) that by his removal of the hypothec after his sequestration he is liable to the pursuers to the extent of its value ; (5) that the sums paid by him in November 1880 having been given and received on the express footing that they applied only to the Martinmas rent then due, he cannot now claim to impute any part thereof in extinction of the rent due for the ensuing half of the year then current : Repels the claims of parties so far as inconsistent herewith : Decerns against the defender for payment to the pursuers of the sum of £25, 5s., with the legal interest thereon from 15th May 1881 till payment : Finds the pursuers liable to the defender in his expenses to the extent of two-thirds as taxed.

J. M. LEES.

"*Note.*—It is urged for the defender that his sequestration necessarily extinguished the obligations incurred by him under his lease. This is a common but an erroneous belief. 'Bankruptcy,' says Professor Bell, 'does not of itself annul a lease. The tenant, though bankrupt, may still continue in the possession, provided he pay the rent regularly and perform the other stipulations of the contract.' Hence, where the landlord desires to avoid having a bankrupt tenant who may prove unable to implement the conditions of his lease, it is customary to insert a provision that the tenant's bankruptcy shall void the lease. But in the absence of such a stipulation the lease remains good and may be taken up by the bankrupt tenant's trustee as an asset in the sequestration, or if he declines to take it up, the bankrupt may take it up and carry it on if he can. If he proves unable to carry it on, then the landlord can sequester ; and if the plenishing be inadequate as a security for the rent, he can obtain from the Court an order on the tenant to replenish

to an adequate extent, and if the tenant fails to obey the order, he may have him ejected and may relet the place, holding the ejected tenant bound for any shortcoming in the rent. But unless the bankrupt tenant agrees to carry on the lease after his sequestration his personal liability ceases, and the remedy of the landlord is against his sequestered estates. Now, how stands the case here? At Whitsunday 1880 the defender entered on the first year of his lease, and during that year his bankruptcy occurred. The rent for the year was £92, 10s. It matters not whether the rent was payable half-yearly, quarterly, monthly, weekly, or daily, the rights and duties of parties were the same. The let was by the year. The trustee refused to take up the lease. For that year, therefore, the tenant, if not ejected for failure to plenish in security of the rent, was entitled to occupy; and the landlord's rights as regards it consisted in the right to sequester and sell the hypothec, and rank in the sequestration for any deficiency between the net produce of the sale and the amount of the rent. If the tenant refused to continue the tenancy and pay the rent for the remaining nine years of his lease, the landlord could claim in the sequestration damages for the tenant's breach of contract. Correctly speaking, his claim for the deficiency in the first year's rent is a claim for damages also, of which the deficiency is necessarily the measure, seeing that the subjects cannot be let to any one else. But for the subsequent years of the broken lease the measure of the damages is the probable loss the landlord will suffer between the old and the new rent. The mere fact that the defender remained in the premises during the year of his lease in which the bankruptcy occurred is thus nothing against him. In November 1880 he paid his rent in full to avoid the landlord's sequestration, and the receipt bears expressly to be for the Martinmas rent. In doing this the defender may have acted wisely or unwisely, but I cannot go back on it. At Whitsunday 1881 he had to pay his rent in full, or else give up the hypothec, and let the pursuers rank in the sequestration for the deficiency of the rent. He says the value of the hypothec was about £30. I am not quite satisfied in regard to this; and, strictly speaking, he having removed the hypothec after his sequestration is liable to the full extent of the rent, for the payment of which it was the pursuers' security. But as I am holding the defender strictly to his bargain in the matter of the Martinmas 1880 rent, I am more disposed to take an indulgent view in regard to the value of the hypothec. The pursuers wish decree for the rent due at Martinmas 1881. Now this is a claim they are not entitled to make unless they show that the defender, after his sequestration, took up the lease. His payment in full of the Martinmas 1880 rent after reinvestiture in his estates favours their contention that he did; for his statement that he paid it to save the sale of his effects must be taken very guardedly, seeing he says they were only worth £30. In *Robertson v. Fraser* (7th January 1881) the Court of Session rejected the idea of an obligation having been created by implication against an undischarged bankrupt by his remaining in occupation till the end of the year in which he was sequestered of the house tenanted by him. Here the defender was discharged and reinvested in his estates. Still, in the light of what I have already said, this would not of necessity beget the implication that he adopted the lease. Our law is familiar with the validation of imperfect obligations, as, e.g. by a widow or a major, of obligations contracted during marriage or minority. They are not, indeed, entirely analogous to the present case; but even in them the proof of adoption or homologation must be tolerably distinct. It appears to me on the whole that the evidence adduced by the pursuers is insufficient to establish that the defender took up the lease after his sequestration.

J. M. L."

Act.—Alexander.—Alt.—Downie.

SHERIFF COURT OF STIRLINGSHIRE.

Sheriffs GLOAG and BUNTINE.

JAMES GREER v. STIRLINGSHIRE ROAD TRUSTEES.

This was an action at the instance of James Greer, mason, Woodlands, Milngavie, against the County Road Trustees of Stirling, concluding for the sum of £200 as damages in respect of the death of his son, aged about two years, who fell over the embankment or retaining wall of the road leading through the burgh of Milngavie into the Tannoch or Barloch Burn, and was drowned in consequence of there being no parapet wall or proper fence or other erection. The defenders denied liability, and pled (1) that the death of the child was not caused by their fault; (2) that it was caused through the fault or negligence of the pursuer or others for whom he is responsible; and (3), or at least that the pursuer's fault or negligence materially contributed thereto.

After proof was led Sheriff-Substitute Buntine pronounced the following interlocutor:—

"Stirling, 3rd January 1882.—Having heard parties' procurators on the proof and whole process and made avizandum, Finds in fact (1) that on 7th July, 1881, a son of the pursuer, aged twenty-two months, was found drowned in the conduit which runs under the road libelled; (2) that the child had been in charge of his sister, aged three years, who was not examined as a witness, and that it is not proved in what manner the child fell into the Barloch Burn which flows through said conduit; (3) that the embankment of the highway at the place where the child was drowned was sufficiently fenced: Therefore assoilzies the defenders: Finds them entitled to expenses of process, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report; and decerns.
J. R. BUNTINE.

"Note.—It appears that the Woodlands Road just as it enters Milngavie passes over the Barloch Burn. The retaining wall of the road at this point is fenced by a railing on both sides. This railing is composed of about a dozen upright posts about two feet nine inches high, and the same distance apart, with an iron rail along the top. The pursuer alleges that his child met his death by falling from this road between the posts into the burn. He maintains that in these circumstances the defenders, the Road Trustees of the county, are liable to him in damages by reason of their failure properly to discharge the statutory duty incumbent upon them of erecting sufficient parapet walls, mounds, or fences, or other adequate means of security along the sides of all bridges, embankments, or other dangerous parts of the highways under their management. The defences are threefold: (1) that the child in point of fact did not fall from the road through the fence, but tumbled into the burn from the field; (2) that the pursuer is barred from making the present claim because the death of his child was caused by his own fault or negligence in allowing it to wander without a proper guardian, or at least that his fault or negligence materially contributed thereto; and (3) that this bridge or embankment was sufficiently fenced. The Sheriff-Substitute does not consider it necessary to consider the two first of these defences, because he is of opinion that the third plea is well founded. It is proved in evidence that this fence is of the same character and description as are in use in similar places on all the highway roads in Scotland, and that it is sound and in good repair and well suited to protect passengers or cattle passing along the road. It is true that it was not calculated to prevent an accident such as happened in this case. It is said that children were in the habit of playing at this place, and that two children had tumbled into the burn some years ago, and that it is a dangerous place for children. But in the view which the Sheriff-Substitute takes of the duty of the defenders in fencing dangerous places and bridges, they are not bound to take precautions to protect children who may use them

as a playground. They are bound to consider the safety only of passengers and cattle, and in his opinion this bridge or embankment was fenced in a manner to satisfy these conditions. J. R. B."

The pursuer appealed to the Sheriff, before whom the case was fully debated, after which he pronounced the following interlocutor :—

"*Edinburgh, 29th March 1882.*—The Sheriff having resumed consideration of the cause, Recalls the interlocutor of the Sheriff-Substitute of 3rd January, and finds (1) that on 7th July 1881 the pursuer's son, a child twenty-two months old, was found drowned in the Barloch Burn, at a place where it passes by a conduit under the road leading from Milngavie to Mugdock, which road is under the charge of the defenders; (2) that there is a fence along the side of said road, where it crosses said burn, which is constructed of posts about three feet high, and placed two feet nine inches apart, with an iron rail at the top; (3) that said child fell into the burn from the said road or bridge, the said fence being insufficient to prevent it from doing so; (4) that the child was not in charge of any one of sufficient age to take care of and protect it; (5) that the pursuer or those for whom he is responsible were chargeable with negligence in allowing said child to stray along said road unprotected: Finds in law, that in respect of said negligence he is not entitled to recover damages from the defenders on account of the death of the said child: Therefore of new assolizies the defenders: Finds them entitled to expenses, allows an account thereof to be given in, and remits it to the Auditor of Court to tax and report; and decerns. W. E. GLOAG.

"*Note.*—The evidence that the child which was drowned fell into the Barloch Burn from the bridge over it is not direct or complete or so strong as not to admit of differences of opinion as to its effect. The Sheriff has studied it carefully and cannot resist the conclusion that the probabilities are greatly in favour of the accident having happened in that way. All the evidence as to the occurrence point in that direction and no other. It would, it is thought, be too strict to reject the evidence of what the other children said immediately or shortly after the occurrence. Their expressions and acts may, it is thought, be received as *res gestæ*, but the Sheriff cannot assent to the proposition stated absolutely that Road Trustees in fulfilling their statutory duty of fencing a dangerous part of a road are not bound to have regard to the danger to children as well as to other people. He is not aware of any authority for such a general proposition. The nature of their duty must to some extent depend on the character of the locality where the road is. In the case of a road near a town or village on which children are apt to be wandering it is certainly far from evident that they would not be bound to place such a fence as would protect children from the danger. If at a place of danger there was no fence at all, and a child should fall over and be killed, it is thought that, in the general case, the Road Trustees would be liable, and a fence too high and with intervals too wide between the posts to prevent children falling through is not very much better than no fence at all as a protection for children. In the present case, having regard to the neighbourhood of the village of Milngavie and of the houses near the road, the Sheriff is not prepared to affirm that this part of the road was sufficiently fenced. And he is rather disposed to express the hope that the fence will be so improved as to prevent such lamentable accidents in future. But he thinks the defenders are entitled to absolvitor on the ground of contributory negligence, not of course of the child, but of those naturally in charge of it. Clearly and admittedly such a very young child should not have been allowed to go about unprotected, and the company of a sister of three years old was no protection at all. In the circumstances the Sheriff considers that it would be unjust to find the defenders liable in damages. Of the authorities which were quoted, the case of *Davidson v. The Monkland Railway Company* (5th July 1855, 17 D. 1038) seems most in point, and it is thought to warrant the preceding interlocutor. W. E. G."

"t.—Wilson.—*All.*—Welsh.

THE JOURNAL OF JURISPRUDENCE.

THE CODIFICATION OF THE LAW.¹

(Continued from page 292.)

FROM the foregoing *résumé* of the history of the agitation for legal reform in England it is abundantly clear that the prospects of either a Code or a Digest of the whole English Law, or indeed of any department of it, becoming an accomplished fact, are as remote as ever. The general conclusion to be drawn from what has been attempted is that at the present day it is next to, if not absolutely impossible to frame such a *Code* on any legal subject as shall be free of faults in the eyes of professional men, and shall survive a passage through Parliament. The only tangible result of real value is the revised edition of the Statutes with table and index, to which reference has already been made—a work the importance of which can hardly be over-estimated. The single respect in which to the Scottish lawyer it appears to fall short is that the ante-Union Acts of the Parliaments of Scotland (as well as of Ireland) are not included.

Much has been made by the advocates of codification of the fact that codes have been produced in other countries in modern times. We think the analogy inapplicable and utterly misleading, and that the problem of codification in this country is of a totally different character from anything that has occurred elsewhere. Foreign codes may all, as a rule, be assigned to one or other of two classes—to neither of which an English Code would belong—viz. those which have been the gradual outcome of generations and centuries in countries where the whole tendency and genius of the nation has been towards codification; and those which have been imposed upon communities which either possessed no settled law

¹ Part II. of Paper read to the Glasgow Juridical Society by Archibald Craig, M.A., LL.B., Glasgow.

at all, or were subject to hopelessly conflicting systems, a code of this latter class being demanded and designed as a necessary *terminus a quo*. The type of the former class is the French Code, which, as Mr. J. A. Dixon of Glasgow has clearly brought out in his able address,¹ was no new-made production, such as Bentham proposed to create for the United States, but only the last and highest expression of a process which had been going on for centuries of French history. After giving a lucid sketch of the legal history of France and tracing the influence of such writers as Domat, D'Aguesseau, and Pothier, Mr. Dixon sums up the history of the French Code thus: "We are apt to forget the slow gestation of centuries that preceded its birth—or rather, how, born necessarily immature, it returned, like the fabled marsupial animals of Australasia, again and again into the womb to undergo a process of regeneration. We are apt to forget that it was not made to order, as our Code must be, but rather *grew*, absorbing into itself from century to century every increment and development of the national law; how the Code was, as a French author has said, the thought of all French generations down through all the ages, and slowly secreted and spun from the entrails of the nation during the whole course of the national existence."

To the second class above described belong such codes as the Indian Penal Code and Code of Evidence, the latter the workmanship of Sir J. F. Stephen. To both of these categories, to a certain extent, belongs a penal code of old date which has attracted much notice—viz. the Code of the State of Louisiana, prepared by Edward Livingston, a native of that State, which became law in 1824. The introductory chapters of that work, which contain much interesting discussion of the whole field of Criminal Law and give many curiously instructive views of the English institutions of that day from a foreign standpoint, bring out that besides the English Common Law a system of ancient Spanish Law prevailed in the State, and hence a uniform code was a matter of pressing necessity.

To revert to the Code Napoléon (or Code Civil), it will be found in other respects besides its history to be entirely unsuited to English notions. That Code is declared to be absolute and final, and, to prevent the growth of judiciary law, judges are forbidden to give authority to precedents, and are left, or rather bound, to use their own discretion. It is indeed (as the Commissioners of 1879 remark) the generality of their language, leaving so much to be supplied by the discretion of judges, which gives to the majority of foreign codes that fallacious appearance of completeness and brevity which creates so much misconception as to what may be effected by a Code for this country. The exclusive authority of the French Code which we have mentioned has had the effect of producing a vast mass of commentary and unauthorita-

¹ *Journal of Jurisprudence* for June 1874.

tive decision on mere questions of construction and interpretation, and it is said that although such decisions may be quoted in the French Courts, a judge may adopt or reject them according to pleasure. A more uncertain and unsatisfactory state of legal administration could scarcely be imagined. Such a system would be in diametrical opposition to the whole tone and tenor of our national life. Whether, therefore, we regard the Code Napoléon in its origin or in its practical working, the conclusion is clear that no argument can be drawn from it in favour of an English Code.¹

It is indeed ever necessary in considering this subject to bear in mind the views urged by Savigny. It is well known that in the beginning of the present century, after the deliverance of the German States from the yoke of Napoleon, and when patriotic schemes were being projected for the union of those States into an organic whole, a fierce controversy was waged as to the expediency of introducing a uniform code for the whole country. The leaders in this discussion were Thibaut of Heidelberg and Savigny. The former, in his essay "On the Necessity of a General Municipal Law for Germany," urged the construction of a body of law—"clear, precise, and adapted to the requirements of the time"—as one of the first conditions of a lasting union. In reply, Savigny in 1814 published his work "On the Vocation of our Age for Legislation," which, although written for a special object, may be regarded as containing all the more important arguments before or since urged against codification in general. In this tract Savigny warmly deprecated the introduction of a code, and urged the expediency of reverting to that mixed system of common and provincial law which had prevailed in the various States before Napoleon, using his Code (as Savigny says) as a bond the more to fetter nations, imposed it upon them. But whilst returning to this original system, he urges his countrymen to oppose to it a vivid creative energy, to obtain the mastery over it by a thorough grounding in history, and thus appropriate to themselves the whole intellectual wealth of preceding generations. One of the leading considerations pressed by Savigny against the introduction of a code is the historical one, to the effect that the law of Germany having an organic connection with the people, or, in other words, being the product of the history and whole life, temper, institutions, customs, and religion of the German nation, and these influences having left their impress not only upon its structure, but upon its minutest lineaments, that law

¹ A striking instance of the inexpediency of attempting to confer finality upon a code may be gathered from a recent case, *Rousillon v. Rousillon*, 1880, L. R. 14 Ch. Div. 351. In this case a French *avocat*, in the course of his evidence, stated that there is no objection in French Law to any agreement in restraint of trade. The explanation of this appears to be that the Code having been framed at a time when such contracts were not thought of, and having been pronounced final, no room was left for the growth of a law, concurrently with the growth of commerce and civilization, which should be applicable to such cases.

could not but be misapprehended and could not escape the loss of many valuable elements and qualities, if it were attempted to translate it into a formal verbal code. Similarly, in considering the question of codification for this country, we must constantly keep in view the special origin, growth, and circumstances of our law. This is precisely what such writers as Bentham have failed to do; and hence they have furnished us with an ideal legislation fit, it may be, for Utopia, but not to be adopted in a country like England, whose law is so deeply rooted in the eventful history of the past.

Let us therefore glance in the first place at the Common Law of this country.

The Common Law is the growth of centuries. Its principal sources are judicial decisions and *dicta*, the great Institutional writers, and usage and custom. We have already referred to the enormous bulk of the Case Reports in which the major part of the Common Law lies imbedded; and even in the day of Blackstone, when that bulk was greatly less, twenty years' study—*viginti annorum lucubrationes*—was said to be necessary in England to the mastery of its principles. Those principles are nowhere stated in precise verbal form, but must be extracted by careful logical processes from the special facts to which they have been applied. Notwithstanding the heavy mechanical labour requisite to educe the Common Law in this way from tracts of decisions, the absence of strict form confers upon it many valuable qualities. It is capable of constant adaptation to new cases as they arise. The *principle* is the constant guide, and this is applicable whatever be the complication of circumstances. Of any new set of circumstances the question is asked whether it falls within that principle. Decisions are referred to which are interpreted in the light of the facts on which they were founded, and not merely by the words in which they were couched. The decision which approaches nearest to the case in question is seldom founded on facts exactly identical. Something may be wanting, something may be superfluous; but from these very variations, from the reasoning used or suggested, a conclusion is arrived at, beyond, parallel to, or analogous with the decision referred to, and so the ends of justice are attained.

Not only does the absence of strict form thus secure the elasticity and plasticity of the Common Law, but it also permits its constant growth in harmony with the growth of civilization. An instance of this may be seen in the law relating to fraud, which is in a process of almost daily adaptation to the ever-growing demand for more perfect purity of intention and uprightness of aim. In truth, the growth of law in any one year can never be gauged by the contents of the Statute-Book. Judge-made law, as it is sometimes called, cannot cease to arise. Unforeseen wants and contingencies arising from the infinite variety and the constant movement of human affairs are ever being provided for by the plastic unwritten law. This process has been described by Sir W. Erle in his work

on Trades-Unions thus: "Life multiplies, proximity increases, and each man would become a nuisance to his neighbour in respect (among manifold other matters) of air and water, labour and capital, production and distribution, if a perpetual process of adjustment was not in constant action. This adjustment is effected by the principles of the Common Law. These principles are applied first in the concrete: gradually they grow into rules of wider application, and words grow appropriate for their expression, and the judiciary men and the legislative men adopt them."

Again, the definitions of legal terminology are almost wholly to be sought in the Common Law; or to speak more accurately, definitions are to a large extent omitted from statutes and the import of terms is left to be gathered from the Common Law. This is because, as we shall afterwards show, all general propositions of law expressed in precise and final language must in many instances be inadequate and misleading; or, as an ancient maxim has it, "*Omnis definitio in jure periculosa.*"

The Common Law is therefore in a constant state of imperceptible, and it may often be infinitesimal, modification, in consonance with the perpetual movement in the national habits and standards. Nor has this the effect of rendering it fickle and arbitrary. Deeply rooted in the traditions and life of the people, and administered by judges and professional men themselves permeated by those influences, it has no tendency in our country to violent change. Sir H. S. Maine has described how the more progressive communities of ancient Greece disembarassed themselves with fatal facility from cumbrous forms of procedure, and ceased to attach any large value to long-established rules. The consequent fate of their legal systems was a precocious maturity and then an untimely disintegration. But no such tendency has ever threatened the law of our country.

Thus the Common Law is a faithful index and reflex of the daily growth and temperament of the nation; and it would be a subject of profound historical interest to trace one of its long-established rules gradually, from faint beginnings, expanding and gaining strength and definiteness through passing generations until it has arrived at its not yet final form. Mr. Froude has shown that a chronological series of statutes is of inestimable value as an authentic skeleton of history. The history of the evolution of the Common Law would be even more valuable, inasmuch as that evolution has been deliberate and orderly, whereas legislative action has often been hasty and ill-considered; and it would bring to light many subtle traits of national life and character which the Statute-Book has wholly passed over.

These considerations will serve to show that whilst undeniably open to the grave defect of inaccessibility, and incident to many risks from imperfect reporting and other causes, the Common is vastly superior to the Statute Law in elasticity of application and

capability of growth and development. It has been compared to a glacier which remains at once elastic and solid; for it is always equal to the demands upon it, yet never decides more than exactly that which needs decision.

We have said that these qualities are due to the absence of a precise verbal form. Human language, from its inherent infirmities, is inadequate to cover all cases and exclude all doubt. Language is in a state of perpetual mutation corresponding to the progress or decline of nations or of particular classes in them. There is scarcely a single word, still less any collocation of words, which will convey precisely the same meaning to one mind that it does to another. Probably no two lawyers would be found to express a legal principle in identical terms. It was said of the Statute of Frauds, which was framed by three of the ablest lawyers of the reign of Charles II., that whilst every line of it was worth a subsidy, yet so obscurely and inaptly was it expressed that the cost of construing it had not been less than half a million. The criticisms of the judges on Lord Cranworth's Bill, and of the Lord Chief-Justice on the Bill of 1879, to which we have before referred, supply conclusive proof, if such were needed, of the utter impossibility in the present day of stating general principles in language so comprehensive and exact as to include their whole contents and exclude all possible question.

Moreover, the elements of a legal principle which would thus be inevitably lost in the process of translation into the language of a statute, could not afterwards be gathered up and preserved, except by a fresh growth of unwritten law. In extracting from a decided case the *ratio decidendi* or principle involved, it is not necessary to attend to the precise words used by the judge. Indeed, such attention would in many cases defeat the very end in view, inasmuch as the principle pervades the case as a whole and possibly exists nowhere in precise statement. On the other hand, in the case of a statute, precision of language having been professedly aimed at, the only legitimate object of inquiry is the import attached by the Legislature to the exact phraseology made use of: if the phraseology be unequivocal, it is incompetent to consider the *ratio legis* or general scope which the framers of the statute had in view in casting its particular provisions. It is only when the terms are doubtful that such scope and history may be looked at.

If these views be correct, it will follow that the conversion into Statute of a system of Common Law like ours, instinct as it is with the very life of the community in which it has grown up and is still growing, would in the present day be attended by disastrous results. A rule of law, as we have sought to show, is wider and deeper than any possible expression of it in language. Therefore, if it be attempted to state such a rule in a legal formula of rigorous exactness, such as would be requisite in a Code, much of its pregnant significance will be sacrificed, and the flexibility and plasticity of

what is left will largely disappear. The growth of the law will be arrested: the words of the Code will be the *ipsissima verba* of the Legislature, and the judge instead of applying old principles to new cases as they arise, will be occupied with the construction of precise verbal expressions.

Sir J. F. Stephen answers the argument that codification would deprive the Common Law of its elasticity by stating that the only plain meaning he has ever been able to attach to it is, that it is good that law should be uncertain, and that the only sense in which this can possibly be true is that there are subjects on which it is desirable the judge should exercise a considerable degree of discretion, which discretion can be conferred upon him by Act of Parliament more completely than by any rule of Common Law. But this answer, plausible as it appears, fails to meet the difficulty, which is simply this: that a Code being enacted, every word of it will thereby be made the word of Parliament, and must be received and weighed as such. This objection is, we think, insuperable.

A further and weighty objection to the embodiment of the Common Law in a Code has been frequently urged, viz. that it will stereotype the (it may be) crude and imperfect conceptions of the passing day, and that a Code would be thus not a boon but a curse to posterity. Space will not permit of further reference to this objection. It forms, indeed, the main argument of Savigny in the work above referred to: who, after an exhaustive examination of the Codes then extant, the condition of legal education, and the then state of juridical language in Germany, concluded that his country had at that time neither vocation nor aptitude for codification. It is truly a grave question whether any one generation is entitled to take upon itself thus to treat a legal system. The expedient suggested to overcome this objection is a periodical revision of the Code; but we shall afterwards show that such a revision in this country would, judging from present circumstances, be practically impossible.

Let us next consider the Statute Law. Did statutes form a body of law complete in itself, none of the objections we have urged in the case of the unwritten law could be maintained against republishing the statutes in the form of a Code. But, in truth, the Statute Law of this country is only the supplement of the Common Law. Statutes are to a large extent passed to provide for cases to which the Common Law cannot be extended. Further, there is not a statute which does not presuppose large bodies of unwritten law, and as we have already mentioned, definitions of terms have as a rule to be evolved from the Common Law. It is therefore obvious that the statutes cannot be codified by themselves; and, from what we have said, neither can they be absorbed into a Code of the whole law, inasmuch as the factor with which they would have to be combined is, in our view, at present uncodifiable. The inconveniences of the present state of the Statute-Book are,

however, very serious, as the Acts relating to a particular subject are frequently found scattered over many volumes. Moreover, the style of many Acts is objectionable. Prior to the Act 13 and 14 Vict. c. 21, it was not possible to introduce a full stop into an Act of Parliament. Hence the sections of an Act are often found to consist of a single sentence of enormous length, drawn up, not with a view to communicating information easily to the reader, but to preventing a person bent upon doing so from wilfully misunderstanding them. Such sentences are not unfrequently of thirty, forty, or fifty lines in length.

Now that the Statute Law Committee has completed its labours, and it is possible to tell at a glance what Acts or portions of Acts are in force on any given subject, it should be a matter of no serious difficulty to consolidate such Acts or portions of Acts into one statute, setting forth with clearness and precision the effect of the whole, and embodying the results of decisions on questions of construction, together with such additional legislation as the wisdom of Parliament might deem advisable. We have already referred to the advantages that have followed the consolidation of the English Criminal Law in the Acts of 1861. Similarly the Acts relating to married women's property, joint-stock companies, insurance, *cessio bonorum*, and so forth, ought to be consolidated forthwith. Sir J. F. Stephen has indicated in the preface to his Criminal Law Digest various mechanical expedients to which he has resorted in order to attain brevity and clearness, which are worthy of careful note. One of these consists in collecting together all the offences which are liable to the same punishment, putting them under one heading, and stating the punishment at the outset. In this way he succeeds in giving the point of the sentence at once, and saves as many (in some cases) as nineteen or twenty repetitions of a long and wearisome formula.

We think we have now said enough to show that it is impossible at the present day, without grave sacrifices and inconvenient results, to frame a Code of English Law.

But let us for a moment assume that a Code *could* be drafted which should embrace either the whole law or a leading department of it, and be free from the objections above stated. The labour would, we think, be entirely lost from the impossibility of carrying the draft through Parliament. Parliament would never delegate its functions in such a matter; and as Sir J. F. Stephen says in the preface to his Digest of Evidence, it would be as impossible to get in Parliament a really satisfactory discussion of a Bill codifying the Law (of Evidence) as to get a Committee of the whole House to paint a picture.

In the first place, a Code would necessarily involve a considerable amount of fresh legislation, whether by way of modifying existing law or by filling up gaps ascertained to exist in it, with a view to symmetry and completeness. The latter

species of legislation is wholly alien to British notions. We always legislate *ex tempore*. We wait till a grievance is intolerable and then we apply ourselves to a remedy that does not go beyond the grievance. In the second place, the form of the Bill would to a certainty be mutilated. Sir J. F. Stephen has propounded a neat scheme for the safe conduct of such a Bill through Parliament; whereby a Legal Committee should revise the measure before it was submitted to Parliament; and any additions to or alterations on the Bill voted by the House should be remitted to such Committee to insert in the Bill in such a way as to preserve its symmetry. We can only answer that such a scheme is admirable on paper, but totally unworkable. To say nothing of the conflicts which might not unfrequently arise between Parliament and the Legal Committee, it is not difficult to imagine cases in which, under misconception, clauses would be grafted on the Bill which it would baffle the ingenuity of the most skilful Legal Committee to incorporate with any appearance of relevancy. In the third place, many of the topics contained in the Bill would give rise to fierce and bitter controversy. Such are High Treason, Capital Punishment, and Marriage Law. The law applicable to Landed Property would, in the light of recent experience, consume at least a whole session of itself; whilst that relating to Succession would open up an infinite series of perplexing questions, such as Primogeniture, Entail, Duty on Heritable Estate, and so forth. We fancy an Attorney-General who had been bold enough to venture the introduction of a Codifying Bill on one of these subjects, would think thrice before repeating the experiment, and would conclude that he had better act on the maxim "*Quieta non movere*." Lastly, the periodical revision of the Code, which is advocated so as to keep it abreast of the times, would only have the effect of stirring up all such questions anew on every occasion of revision—and would therefore be equally impossible in practice.

In discussing the question we have hitherto made no distinction between Civil and Criminal Law. The codification of the latter would be attended, equally with that of the former, by the practical Parliamentary difficulties to which we have drawn attention, and which we regard as quite insuperable at present. But the theoretical objections above urged do not appear to apply so strongly to the Criminal Law of to-day. They had much greater force a generation ago. The Criminal Law is now well settled and fixed, both as to the nature and the punishment of most offences. The questions

"Incertam si vocem det tuba, quis se parabit ad pugnam?
Incertam si vocem det lex, quis se parabit ad parendum?"

have now lost much of the undoubted force they possessed at the time, for example, when Livingston prepared the Louisiana Code. Nor would any judge of our day venture, we think, to extend the

law to what might be regarded as a new offence. We are of opinion, therefore, that whilst there is little call for a Criminal Code, and whilst its undoubted result would at first be to allow the escape of offenders whom the Common Law would have reached, yet that no serious harm would now be sustained by the Criminal Law itself in the process of codification. If such a Code be again attempted, we are of opinion that it ought to be a Code for the United Kingdom. In no branch of law are the universal and permanent elements more prominent than the Criminal; and it is certainly desirable in the public interest to assimilate the Criminal Law of the three kingdoms, or at least of England and Scotland. But, as already mentioned, we regard the difficulty of passing such a Code, however perfect and desirable, through Parliament, as at present insurmountable.

Hitherto our criticism has been mainly destructive. But the crying evils of the confusion and inaccessibility of the law remain, and must ere long be faced and met in some way. What then is to be done?

We think a Digest of the whole law, such as the Digest Commissioners have recommended, would be free from all the objections, theoretical and practical, to which a Code is open. Dr. Holland, in his essays on the Form of the Law, has given a specimen of such a Digest as we think ought to be executed. The subject chosen by him is a subdivision of the English Law of Easements, and like the productions of Justinian, Dr. Holland gives the *ipsissima verba* of the law sources—the statutes, or parts of statutes, bearing upon the subject appearing as separate enactments, and the Common Law appearing as far as possible in the shape of quotations from jurists or decided cases. A prior step to such a Digest would necessarily be a consolidation of the statutes such as we have above suggested.

A Digest executed in this way by men of the highest ability would be of extreme value. Prepared on a comprehensive plan, it would contain the whole law on every separate topic, and would thus be like a well-arranged storehouse, to which the lawyer and the legislator might resort with the certainty of finding everything in its place, and no portion of the law extant at the date of the Digest omitted.

On one point thrown out by the Digest Commissioners for solution, viz. as to the nature of the authority the Digest should be declared to have in the Courts, we are prepared to indicate a decided opinion. To ask the opinion of Parliament on the matter would at once open the door to many of the practical difficulties we have indicated as likely to attend a Code; and as authority could be conferred upon it in no other way than by Parliament, we say that it should rest solely upon its intrinsic merits. From the skill and time which would be expended on its preparation, it might reasonably be expected to be a monument of modern

industry and accuracy; and such would be its value that in no long time it would practically supersede the law sources anterior to itself, and gain a position of large though unofficial authority in the Courts themselves.

It must never be forgotten, however, that the production of a Digest of the whole law on the lines above indicated would be a work of almost incalculable labour. Many years would no doubt be consumed in its preparation; and from the high talent necessary to ensure a perfect result, the cost would be enormous, but inevitable.

That such a *magnum opus* will be undertaken at an early date we see nothing to encourage us to hope. Nothing of importance will ever be accomplished until a special department of Government with ample powers be created for the purpose; whether such a department should be made permanent or not events alone would determine.

Should such a Digest of English Law be ever seriously proposed, it would be the imperative duty of Scotland to press for the simultaneous execution of a Digest of Scottish Law, so as to preserve the distinctive excellences of our own system. If this be not done, the opportunity will be lost for many years; for if independent arrangements be made for executing the English work, and that work be once commenced, the answer to Scottish demands will in all probability be an advice to exercise patience, and wait the result of the English scheme.

The general results arrived at in this paper may now be summed up in the following propositions:—

1. Codification in this country is a special problem, differing widely from that which has occurred in any other country ancient or modern; and therefore the analogy of existing Codes is misleading in the last degree.

2. The agitation for amendment of the *form* of the law has in this country as yet produced no practical result, excepting only the invaluable work, now completed, of Statute Law Revision. It has, however, been useful in bringing out clearly the peculiar conditions of the problem, and also in incidentally revealing many serious defects in the *matter* of existing law.

3. A Code of Civil Law, partial or entire, is, in the present state of the law and the country, alike undesirable on theoretical, and impossible on practical grounds.

4. Owing to the greater rigidity and definiteness of the Criminal Law, a Criminal Code is not to the same degree open to the theoretical objections to a Civil Code; but it is not seriously called for, and would, like the Civil Code, be impossible on practical grounds.

5. The statutes on particular subjects should be consolidated forthwith. For this the Statute Law Revision has fittingly prepared the way.

6. The statutes having been thus consolidated, a Digest of the

whole law, such as the Digest Commissioners have recommended, should be commenced and carried out under State superintendence, such Digest being conceived on a comprehensive, scientific plan, and consisting of a careful collection under appropriate heads of the whole existing law on all subjects,—the law so collected being stated as far as possible in the *ipsissima verba* of the law sources; and such Digest having no authority interposed to it by the Legislature, but resting solely on its intrinsic worth. A Digest thus constructed would, it is submitted, be free from all the objections, theoretical and practical, maintainable against a Code.

7. In order to preserve the distinctive excellences of Scottish Law, a similar Digest of it should be executed *pari passu* with the English work. The gradual assimilation of the law of both countries on the subjects on which the need therefor most exists, would probably be promoted by such simultaneous execution of the two Digests.

To these conclusions, then, a review of the history of the movement and an examination of the question on its merits appear equally to conduct. We confess we have reached them with reluctance. There is a fascination, at first blush, in the idea of a small pocket-volume, like the French or Belgian Code, containing the whole law of a country within its covers. Closer inspection shows that such a compend is in present circumstances neither possible nor desirable for these realms. An English Code, entire or partial, is to-day a mirage, in the pursuit of which much invaluable energy and untold expense will be wasted, with no result but disappointment alike to legislator, lawyer, and layman. The idea of "every man being his own lawyer," whether under a Code or a Digest, may be dismissed as a specious phantasy, founded in blindness to the difficulty of applying abstract rules to concrete facts, and in ignorance of the inadequacy to meet all possible cases, of any system of rules, however complete. But by a Digest such as we have advocated it may not unreasonably be expected that the knowledge of the law shall be brought, with certainty and without undue labour, within the reach of the professional man, and with that result we may be well content.

A RECENT CASE OF PROVING THE TENOR.

CAN a man ever lawfully destroy his antenuptial marriage contract? Can he do so while the wife is alive for whom it makes provision? Can he, while his wife is alive, when children of the marriage in contemplation of which the contract was executed have come into existence and taken right under the contract, put that contract into the fire with the intention of altering the rights created by it, and thereby alter these rights so effectually that the

contract, though its terms be clearly proved and its solemn execution be matter of certainty, can never be set up for the purpose of restoring the rights which it created? Or can a man and his wife ever lawfully agree after children of their marriage have been born, or at least when such children may be born, to tear up their antenuptial contract of marriage? These were some of the questions involved more or less directly in the recent case of *Smith v. Ferguson* (31st May 1882, 19 S. L. R. 631) to which we propose to make reference in the present short paper. We rather think that the answer to all these questions which first rises to a lawyer's lips is a great and emphatic No! He remembers the unanimity with which the institutional writers lay it down that an antenuptial contract of marriage is not less onerous than any contract that a man can enter into. He sees daily illustrations of the truth—itsself obvious enough—of that doctrine. He knows well, especially if he be a conveyancer, how a marriage contract may gather up into itself, like a snowball rolled along snowy ground and increasing as it rolls, the interests of numerous families, how it modifies the advances a husband and father makes to his children or grandchildren, how it—so far as reasonable—may compete with his ordinary debts in his bankruptcy, how verbosely it is narrated in the narrative of his will, and how important its effect therein, how it may itself act as his will. In short, he regards it as being always what it generally is, a family settlement of the most important kind, and to the questions we have just been putting he answers "No!" But let him be slow to make such a hasty and categorical answer. It was decided nearly a hundred years ago, both by the Court of Session and the House of Lords, that the second question we have put, at least, may be answered in the affirmative in some circumstances, and the recent case of *Smith v. Ferguson* decides that there may be circumstances in which a man may, unknown to his wife and for her benefit, destroy the antenuptial contract which he and she executed on the eve of marriage, and prejudice thereby the rights of succession which would have belonged to his children if the marriage contract had continued to subsist. That is, he may in some circumstances by such an act give to his widow the legal rights of which she had deprived herself by the bargain which she made in her antenuptial contract of marriage, and thereby, having by his marriage contract (as events have turned out) greatly increased his power of testamentary disposition at the expense of his wife's legal rights, may part with this advantage without the execution of a testament at all. To put the same thing in other words, his children find at his death that by his marriage contract their father had bargained with his wife to accept at his death a sum less than, as now appears, she would have been entitled to take, that therefore of course the succession which will open to them by his death intestate has been enlarged, that he has died intestate, but that by the mere act

of destroying his marriage contract he has, not less effectually than if he had done it by will, left away from them the amount of the difference between the widow's provisions by contract and her provisions at law. Indeed the recent decision has done more than this. It has decided that in circumstances in which this doctrine, which seems at first so strange, may lawfully apply, the absence of the marriage contract (if it was kept within the husband's power) will raise a presumption that he *did* make his will in this strange form by destroying the contract, thereby declaring his will to be that his wife and children should be situated exactly as the law would have placed them if he had died without either having executed a marriage contract or made his will. And unless the children shall rebut this presumption by proof that the marriage contract has disappeared in some way inconsistent with its designed destruction by their father, the marriage contract must be held to be as if it had never been.

What then are the circumstances in which this strange doctrine may be applied? The answer to this question may best be given by a short narrative of the facts in the case of *Smith v. Ferguson*, a case in which the judges of the First Division have followed and, as it appears to us, somewhat extended the rule which was applied in the case of *Donald v. Kircaldy* (M. 15,831, aff. 3 Pat. Ap. 105).

In 1868 Mr. W. B. Ferguson, then a widower with five daughters, was married to Miss Mary Louisa Smith. An antenuptial contract was prepared (and for the purpose of the decision was assumed at any rate to have been duly executed) by which the following provisions were made for the event of the wife's survivance of her husband. The husband bound himself to provide her in a life-rent of his household furniture and in an annuity of £200, to be restricted to £100 in the event of her second marriage. That was all. There was not even security for the annuity given. In return the wife conveyed to her husband all the property she then possessed or might acquire. She seems neither to have had nor acquired any. She also bound herself if necessary to aliment and educate out of the annuity just mentioned the children of the marriage, and also the five children of her husband's previous marriage. Further, in consideration of the provisions made for her, she discharged her legal rights against her husband's estate. There was thus very little value given upon the one side, and none at all upon the other except in one very important particular, the singular and heavy obligation which was laid upon the wife of supporting out of her annuity the family of her husband's first marriage. When looked at with reference even to his narrow means at the date of the marriage, the provisions made by the husband in return for this obligation and the wife's renunciation of her legal rights were by no means excessive. Even at the date of the marriage she could not be considered to have acquired any very valuable right. But in a few years the state of the husband's affairs became very different. From being

a poor man he became a man of considerable means, and at his death in 1881 he left moveable estate to the amount of £20,000 and heritable estate to the value of £5000. By his second marriage he had four daughters, who survived him along with their mother and the children of the first family. The widow's position at the date of the dissolution of the marriage was therefore this, that instead of being entitled to a valuable right of terce and to her legal right of *jus relictæ* in her husband's large moveable estate, she had only right to an annuity of £200, if the contract of marriage to which we have referred had ever been, and was still, an existing document. Assuming its existence till within a period recently before his death, her husband had evidently been a large gainer by it. He could have left the whole of his property, after deducting the annuity and his children's legitim, as he chose. But he died intestate, though not long before his death he had spoken of making a larger provision for his wife than his marriage contract gave; and the marriage contract, which he had been wont (it was believed) to keep in his own possession, was nowhere to be found. Was the effect of its absence to be that the widow was to have her legal rights instead of her conventional provisions? To avoid this result the tutor and curator for the minor children of the deceased, together with the children who had reached majority, raised against the widow an action of proving the tenor of the lost contract. Her defence was twofold. She maintained that in point of fact it had never been executed. She also maintained in point of law that assuming it to have ever been executed, it was not enough for the pursuer merely to allege its disappearance. Since it *had* disappeared the legal inference was that her husband had destroyed it in order to release her from a position which might have been fair at the time of his marriage, but was hard and unequal at the time of his death. "He might have done this by will," she pleaded; "must he not be held to have done it by the simple course of destroying the document which had come to be all in his interest and all against hers?" With regard to the first of these grounds of defence it is unnecessary to say almost anything, since the whole legal interest of the case turns on the second. It may only be remarked that on the question of fact whether this contract, which was said to have been executed only fourteen years ago, was really executed at all, the proof was amazingly conflicting, so much so that the Lord President expressed his gratification that he did not require to base his judgment upon an opinion either that it had been executed or that it had not. On the one hand, the widow, whose evidence of the matter Lord Mure believed, positively declared that she had never signed a marriage contract at all (and it was certainly a matter which the lady could hardly have forgotten if it had ever occurred), and she produced evidence which made it at least doubtful if she had been in the place in which she was said to have signed it on the day of its alleged execution.

On the other hand, the contract was certainly prepared. It was prepared by a man of business. He had died before the husband, but his account for its preparation, and also for engrossing it on stamped paper, was produced. The draft was extant also among his papers, and his widow stated that she distinctly remembered comparing it with him when it was engrossed, that he had gone to Stonehaven, where it was said to have been signed, along with the husband for the express purpose of having it executed, and—most important thing of all—that she had afterwards seen the completed deed with the signatures of the contracting parties appended to it. Most pregnant proof of all, it seems to us, was afforded by the production of a diary of the man whose marriage contract it was said to be, which appeared to have been regularly kept, and in which was entered, on a date four days before the marriage, the words “marriage contract signed.” From this evidence, coupled with the reference made by the husband to what was understood to be a marriage contract not long before his death, it is not surprising that Lords Deas and Shand concluded that the execution of the document was proved. It must be said of the proof, in words by which Mr. Justice Kay and Mr. Punch have between them made a recent conflict of testimony and recollection between a noble plaintiff and a Serene Defendant notable, that the evidence was “wanting in precision.” The evidence affords a striking proof not, we think, of wilful untruthfulness, but of the manner in which respectable people on the one side or the other must have persuaded themselves of the truth of what they wished to believe.

The other ground of defence, which in the end the majority of the Court sustained, was founded partly on the authority of the case of *Donald v. Kircaldy* already cited, the Session papers in which will be found to contain an elaborate argument by some of the greatest counsel of their day. James Donald married Anne Kircaldy in 1774. An antenuptial contract was executed. The bride's fortune was £200, and the husband undertook to give at his death a jointure of £50 per annum and a share of furniture. A provision was stipulated for issue, if any, of the marriage, and their rights and the widow's were expressly excluded. The husband kept one duplicate of the contract, the wife's father another. As years went on the husband's means increased until at his death in 1785 he was possessed of £2000 in heritage and £5000 of moveable property. No children had been born of the marriage. After Mr. Donald's death his duplicate of the contract was not found, and an attempt to show that the widow or her father destroyed it immediately before or after his decease failed. The widow's father had no longer his duplicate to produce, and he explained that he had destroyed it at the husband's wish, for the object, it was understood, of increasing the widow's provisions. There was other evidence of Mr. Donald's desire to provide better for his wife than he had done in his marriage contract. In these circumstances the heir-at-law tried

to prove the tenor of the lost contract, and the widow defended the action, pleading just as Mr. Ferguson's widow did in the recent case, that the person who wished to set up to the prejudice of the widow such a deed as the contract of 1774 must prove a special *casus amissionis*, i.e. must make it clear that the deed perished by accident or in some other way inconsistent with the intention of Mr. Donald. The heir, on the other hand, maintained that the class of cases which required a special *casus amissionis* is the class, such as bonds or bills, which do not require other deeds of renunciation to discharge them, that class in which discharge by mere cancellation is so usual that a prudent man does not generally require a deed of discharge; while deeds of a permanent nature which are not in use to be so discharged, and particularly a marriage contract, "which is perhaps of all transactions of human life the most solemn, the most important, and the least possible to be defeated," require it only to be stated that they have gone amissing in order to entitle a person having an interest to set up the deed to pursue a proving of the tenor. The test, according to this argument, was, Is it ordinary or safe to try to undo a contract of marriage, and even if it is so, is this shorthand method of cancellation the way in which anybody might be expected to try to do it?

In *Donald's* case the widow prevailed. The House of Lords as well as the Court of Session held that the marriage contract from which the relative interests of the spouse had as it were drifted away, had become before the husband's death something like an obligation in his favour. It was no longer an obligation in which he was debtor to his wife to leave her in a position suited to his means. It was rather an obligation in which he was creditor, by holding his wife to which he was free to bequeath his whole fortune as he willed, with the exception of a paltry annuity. The judges held, therefore, that when it was proved that he had in his mind to get rid of this unsuitable contract, and to give his widow better provision, and seemed to have actually intended to do so by the destruction of the contract itself rather than, as he could so easily and naturally have done, by a will in his wife's favour, the absence of the contract in a manner consistent with his expressed wish to destroy it, must be held to import that it was really destroyed, and that its destruction was an act which, on the principle that a creditor in a mere personal bond may free his debtor by destroying the obligation, he was entitled to do. Decree of proving the tenor was therefore refused, because the Court would not set up the obligation which the creditor was held to have passed from and destroyed.

In the case of *Smith v. Ferguson* also the widow prevailed, and the principle of *Donald's* case was carried further. It will have been observed that the facts were different from those of *Donald's* case in two very important respects. In the first place, there

were at the date of Mr. Ferguson's death children in existence, for the benefit of some of whom stipulations were made in the contract of marriage, while others had sprung from a marriage entered into on the faith of it. The first family had made for them under it all the provisions their father could give them at the date of it, their legal rights remaining of course unchanged. In the second place, in the case of *Smith*, unlike that of *Donald*, the evidence did not point in the least degree to a wilful destruction of the marriage contract by the husband. His position relatively to his marriage contract was indeed just like that of Mr. Donald. He knew, and indeed expressed himself as knowing, that the provision in his marriage contract was utterly unsuited to his altered circumstances, that as between him and his wife it was a provision in his interest and against hers. But from nothing that he did or said did it appear that the idea of cancelling the effect of the contract by destruction of it ever crossed his mind. On the contrary, the evidence rather pointed to his intention to remedy its effects by making a will. Now a will he never made. He but talked of making a settlement, as men often do talk and yet never make one. The case is therefore a far sharper and stronger instance than that of Donald of the rule of law, that where an obligation ordinarily bilateral and even of the nature of a most solemn contract has become from emerging circumstances of a character practically unilateral, and the document expressing it goes amissing in the hands of the party on whom the benefit is conferred, the presumption is that he has destroyed it on purpose, and a mere averment that it is lost or amissing will not entitle any one having an interest to set it up, to be allowed a proof of its terms. A special *casus amissionis*, such as destruction by accident or by the act of another than the person having right to destroy it, must be averred.

Lord Deas dissented from the decision, holding that the case was distinguished from that of *Donald* by the existence of children for whom provision was made by the contract, and that the answer was insufficient that the children would one and all receive their legal rights. It seems to us that there is much force in his Lordship's view. Mr. Ferguson died intestate, and his children as his next of kin were according to ordinary rules entitled to benefit by that fact. He had at the time of his marriage stipulated for freedom for a fixed price from an obligation which attached to his estate, and had so declared that the division of the remainder at the time of his death should be bipartite, one-half legitim and one-half dead's part. He never carried out his intention of dealing with the dead's part by will, and his children as next of kin were according to ordinary rules entitled to take it. But the decision, proceeding on the presumption to which we have referred, declared that the mere absence of the marriage contract which he intended to supersede and not to destroy (so far as direct evidence apart from the presumptions of law could show his intentions)

imported that he had willed that the division should be according to the ordinary legal rules of succession. As Lord Deas remarked with very great force, there is no evidence that this was the particular change which he wished to make on the previous arrangement of his affairs, and the interlocutor of Court therefore becomes very like a will made for Mr. Ferguson in the Law Courts which he never made for himself, and which may very well not be the will which he had unfulfilled intention of making. Many a man has by dying intestate cruelly disappointed hopes which he had held out to his wife by his declarations of what he meant to do in his will. Lucky the wife who can bring to her aid a presumption which restores her without any will at all to the legal rights which she had bargained away.

The practical lesson to be derived from this case seems to be that a marriage contract which is not in its own terms, or which has by the process of events ceased to be, other than a mere obligation of the nature of a personal bond, is to receive exactly the treatment which the obligation it resembles would receive, and stands in no peculiar position in virtue of its former force and effect, or of the name it bears. That which has ceased to be bilateral and become practically unilateral is to be treated as unilateral, and that which is really unilateral from the first is not to be altered in its effect by the circumstance that it is in a bilateral form, or is called a contract.

Again, it will be observed that the recent decision involves an assumption of the possibility of an agreement between a husband and wife that the wife shall renounce provisions made for her by her contract of marriage, and accept in place of them either different provisions or her legal rights. Obviously this could not be done to the effect of altering to the prejudice of children a contract in which they had a *jus quæsitum*, but in a case where the children of the marriage are left by the contract to their legal rights, it seems clear that the husband and wife may agree to alter by destruction of the contract the rights of the wife, subject always to the law relating to donation *inter virum et uxorem*. This seems indeed to follow from a decision that the widow is entitled, if her interest is thereby advanced, to acquiesce in the destruction of the marriage contract by the husband, and to maintain that he was entitled to destroy it.

With these observations we leave the consideration of the case of *Smith v. Ferguson*. The principle of it, that a deed, whatever it be called, is to be dealt with according to its real nature and effect, is certainly neither new nor unfamiliar, but the case itself was one so interesting and so singular that we have thought it worthy of a brief reference. When once it is conceded that a marriage contract which is entirely for the benefit of one party, and thus resembles a bond more than a contract, may be treated as a unilateral obligation, and that the particular contract under consideration was of that character, the conclusion arrived at by the majority of the

Court seems irresistible. We cannot but feel, however, that any one who reads attentively the report of the case must have a suspicion that a legal presumption has in this instance triumphed over the probabilities suggested by the evidence.

PARLIAMENTARY OATHS IN FOREIGN COUNTRIES.

THE subject of Parliamentary oaths and affirmations recently occupied the attention of the House of Commons and of the country to such an extent that a reader may be apt to say, "What is the use of bringing up that subject again? everybody is heartily sick of it." It would be more correct to say that everybody was heartily sick of the particular case and the not too particular man. The subject itself has not passed beyond the pale of inquiry and discussion, as is evidenced by the circumstance that a Bill intended to make certain important alterations upon the law as to Parliamentary oaths, introduced by no less an authority in such matters than the Duke of Argyll, is at present before the House of Lords.¹ It may therefore be not inopportune to inform our readers what are the regulations as to oaths and affirmations in force in legislative assemblies on the Continent and in America, and besides, as it appears to us, the subject has an interest of its own. Lord Granville, the Foreign Secretary, addressed a circular despatch to her Majesty's representatives abroad, requesting them to furnish him with reports upon "the political oaths or affirmations required from the members of legislative assemblies" in the countries to which they were accredited; and it is from a Parliamentary paper containing the reports sent in answer to this request that we draw our information.

One of these reports, that from Montenegro, is amusing. It is of the "snakes in Iceland" order. Mr. Kirby Green, her Majesty's representative in that troublesome little State, writes, "I have the honour to reply that the principality of Montenegro is not endowed with a legislative assembly." It is a wonder that a report was not required of the oaths and affirmations required of members of the

¹ The Bill provides that "every member of the House of Lords who may intimate in writing to the officer who may be charged by that House with the duty of administering the oath required by law, and every member of the House of Commons who may intimate in writing to the Speaker, that he has a conscientious objection to the form of the oath required by law, or that the taking of an oath would have no binding effect on his conscience, may instead of taking and subscribing the said oath, make a solemn affirmation in the form of the said oath, substituting the words 'solemnly, sincerely, and truly declare and affirm' for the word 'swear,' and omitting the words 'so help me God,' and the making such affirmation with such substitution as aforesaid by such person shall have the same effect as the making and subscribing by other persons of the oath now required by law."

Legislative Assembly of Afghanistan. The foreign knowledge of the Foreign Office is evidently not without its limits. The incident of the Foreign Secretary requiring information as to the Parliamentary oaths and affirmations administered to members of the Legislative Assembly of Montenegro, not knowing whether there was or was not a legislative assembly there, reminds one of the story of the Duke of Newcastle, the elder Pelham, determining to send troops to Annapolis, not knowing where Annapolis was. But to give the Duke his due, he took care to inquire. "Must send troops to Annapolis; by all means send troops to Annapolis. Where is Annapolis?" The Foreign Secretary, we think, has a right to complain of the Foreign Office officials who did not supply him with the information which they ought to have had in their possession. It is another illustration of the Scotch proverb, "The shoe-maker's wife is aye ill-shod."

There are very few countries in which no oath or affirmation is required from the members of the legislative assemblies. Neither is required in the German Empire, in France, Hungary, Croatia, Sweden, Norway, Roumania, and (apparently) Wurtemberg.

In Austria alone the form is an affirmation, not an oath, which surprises one, considering that Austria is a Catholic State.

Either an oath or an affirmation at the option of the member may be taken in the Netherlands and the United States; but one or other must be taken. In Switzerland an oath is the form; but since 1875 a solemn promise may be substituted in the case of members whose religious convictions preclude them from taking an oath in the usual manner.

In most countries an *oath* must be taken. It is imperative, and imperative in a prescribed form, in Italy, Spain, Portugal, Belgium, Denmark, and Servia, and in the local Parliaments of the German States, *e.g.* Prussia, Hesse-Darmstadt, Baden, Saxony, Saxe-Coburg and Gotha. Wurtemberg seems the only exception.

But even where it is imperative to use the prescribed form, there are differences. Thus in Prussia it is permitted to strengthen the oath by means of any form of confirmation corresponding to the member's creed. In Italy it would seem that the terms of the oath must be used without either addition or qualification. In Greece and Bavaria the oath must be taken in the prescribed form, but liberty of modification is allowed in the case of members not professing the Christian religion. In Bavaria, in such a case, the words in the oath "and His Holy Gospel" are excised. In Greece, in the case of such persons, the oath is taken conformably with the rites of their own religion. There is no case in which a member is allowed to select any form of oath at his pleasure. The only instance on record, so far as we know, of an oath being taken in a form of his own invention by the person taking it, occurred on the famous 18th Brumaire, when General Bonaparte, intrusted with the command of all the military forces, went before the Council

of Ancients and took a sort of oath of fidelity founded "*sur la vraie liberté*." The circumstances of the 18th Brumaire deter us from regarding this as a constitutional precedent.

As was to be expected, there are great differences in the different countries as to the terms of the oath, as to the obligation undertaken, the sanction embodied in the form of the oath, the mode of administration, the manner of taking the oath, and even the officers by whom the oath or affirmation is administered. As regards the obligation undertaken, sometimes, as in Denmark and Belgium, the obligation is simply fidelity to the Constitution; sometimes, as in our own country, simply of allegiance to the sovereign; sometimes, as in Austria, both; sometimes, as in Switzerland, there is added a declaration of devotion to the country or fatherland; sometimes, as in Hesse-Darmstadt and other German States, there is added to the obligation of fidelity to the Constitution and allegiance to the sovereign an undertaking to do all that lies in the member's power to promote the welfare of the people; sometimes, as in Switzerland, an undertaking to discharge the duties of a member faithfully and to the best of the member's ability; and lastly, in one case, that of Portugal, there is an obligation to maintain the Catholic religion, which is really an oath of allegiance to the Church. As regards the sanction, sometimes, as in Belgium, the formula is simply "I swear;" usually there is an express appeal to the Deity; sometimes there is a more minute reference to the national creed, as in Denmark, where the reference is to "God and His Holy Word," or to "God and His Holy Gospel" (Bavaria), or to "the Consubstantial and Indivisible Trinity" (Greece). As regards the manner of taking the oath, usually the right hand is held up when the oath is taken; sometimes, as in Hesse-Darmstadt, the right hand is raised above the head; or the right hand may be placed upon the Book of the Gospels (Portugal), or the oath may be taken, as in the Netherlands, according to the rites of the member's own religion; or it may be taken by simply signing the formula (Denmark). As regards the persons who administer the oath, usually it is the President of the Chamber who does so, or it may be, as in Italy, a Minister of State, or, as in the Netherlands, in the case of members of the First Chamber, the sovereign himself; or, as in Hesse-Darmstadt, the sovereign, unless he chooses to delegate the duty.

We shall now proceed to a detailed account of the oaths or affirmations and the mode of their administration in the various countries.

In Portugal the form of the oath for the House of Peers is as follows: "I swear on the Holy Gospels that I will faithfully comply with my duties as a Peer of the realm, and maintain the Catholic Religion, as well as the integrity of this kingdom; that I will observe the Constitutional Charter of the 29th April 1826, as well as the Additional Act, and will cause it to be observed by

others as far as may lie in my power; that I will be faithful to the King and to my country, and that I will promote the general welfare of the nation." The oath required from members of the Chamber of Deputies runs as follows: "I swear to be inviolably faithful to the Catholic Apostolic Roman Religion, to the King, the nation, and to the Constitutional Charter, and to co-operate, as far as lies in my power, in the enactment of just and wise laws, which may tend to the prosperity of the people, to the glory of the King, and to the splendour of the State." The oath is taken in this fashion: the member advances to the table before the President, places his hand on the Book of the Gospels, and pronounces the prescribed words.

In Greece, according to the sixty-fourth article of the Constitutional Charter, the deputies to the Chamber, before entering upon their duties, take in open session an oath which is in the following terms: "I swear in the name of the Holy and Consubstantial and Indivisible Trinity to be faithful to my country and to my Constitutional King, to obey the Constitution and the Laws of the State, and to fulfil my duties loyally." This is the oath required of deputies professing the Christian faith. The article provides that those not of that creed take the oath conformably with the rites of their own religion.

In Servia, according to the fifty-second article of the Constitution, all members of the Skuptshtina, when they enter upon their duties, take the following oath: "I swear by one God, and with all that is according to the law most sacred and in this world dearest, that I will faithfully preserve the Constitution, and that I will have before my eyes unceasingly in my proposals and voting the general good of the Prince and people, according to my persuasion and my knowledge. And as I fulfil this, so help me God in this and that other world."

These three countries, Portugal, Greece, Servia, appear to be those in which the sanction is most emphatic. In contrast we next take Belgium, where the sanction of the oath is least emphatic and the obligation undertaken is least extensive.

In Belgium, in the Senate, when an election has been declared valid by the Senate, the new senator is brought into the House, and turning to the table he repeats the following oath, which is pronounced by the President: "I swear to observe the Constitution." This ceremony over, the member elect is admitted and declared a senator by the President. The taking of the oath is recorded in the minutes of the House. In the Chamber of Representatives the President invites the representatives to take the oath required by the Constitution and reads aloud this formula: "I swear to observe the Constitution." The representative standing up, and raising his right hand, repeats the words in full or simply says, "I swear it."

In Denmark the oath of each member of the Landesthing or

Folkething, the two divisions of the Rigsdag or National Assembly, as soon as the validity of his election has been determined, is taken by signing the following formula, a copy of which is presented to the deputy by the President of the assembly: "I hereby promise and swear to maintain the Constitution. So help me God and His Holy Word. The 18 ."

In the Netherlands the members of both Chambers of the States-General take two oaths or declarations, a preliminary one that their election has been pure so far as they are concerned, and that they will act purely in their office; the other and main one, of allegiance to the fundamental law. According to Article 83 of the Constitution the members of the Second Chamber upon their entry on their duties take an oath each according to the rites of his own religion, or make a promise, in the following form: "I swear (I promise) allegiance to the fundamental law. So help me God. (I promise it.)" This oath or promise must be preceded by the other oath or promise referred to, which is in these terms: "I swear (declare) that in order to be appointed member of the Second Chamber of the States-General, I have neither given nor promised, and will neither give nor promise, directly nor indirectly, under any pretext whatever, any donation or present, to any person either in or out of office. I swear (promise) that I will never receive from any one whomsoever, under any pretext, directly nor indirectly, any donation or present, to do, or to leave undone, anything whatever in the exercise of my duties. So help me God. (I declare and promise it.)" The oaths are taken or the declarations made before the King, or at a sitting of the Second Chamber before the President, authorized to that effect by the King. Article 86 provides that members of the First Chamber shall in presence of the King take the oaths or make the declarations prescribed for the members of the Second Chamber. The only difference is that it is always in the presence of the King that the oaths are taken or the declarations made of the members of the First Chamber.

In Austria, immediately after taking the chair, the President in both assemblies requires all new members to promise "Fidelity and obedience to the Emperor, observance of the constitutional and all other laws, and conscientious discharge of their duties." If the President of the Upper House or the temporary President of the Lower House happen himself to be a new member, he must make this affirmation before the Emperor, the former before the opening of the session, the latter before taking the chair.

In Spain the oath of the members of the two legislative assemblies, the Senate and the Congress, is in the following form, and is taken in the following manner. One of the secretaries puts these questions to the member who is about to take his seat: "Do you swear to maintain the Constitution of the Kingdom of Spain? Do you swear fidelity and obedience to the legitimate King of Don Alfonso XII? Do you swear to properly and faith-

fully fulfil the charge intrusted to you by the nation, ever considering its welfare?" The member kneels, places his hand on the Gospels, and says, "I do." The President replies, "Then may God repay you; but if you fail, may He claim it from you."

In Italy it is an oath which is required from senators and deputies, and it is in the following form: "I swear to be faithful to the King, loyally to observe the Constitution and the Laws of the State, and to perform my functions in the sole view of the inseparable welfare of the King and of the country." This formula is obligatory and universal, and is taken alike by Catholics, Protestants, Jews, or Atheists. No addition or qualification is allowed to be made. A deputy of the Clerical party added the words "without offending against the laws of the Church;" but the President of the Chamber would not permit this addition. The deputy left the Chamber, returned to his constituency, was re-elected, and then took the oath in the regular form. A Republican deputy desired to make some reservations before taking the oath, but the President refusing to allow this, the deputy accepted the usual formula. Senators, being elected for life, take the above oath only once; deputies each time they are elected. At the opening of the legislative session the Minister of Justice invites the new senators to take the oath. He reads the words of the oath, and each senator on his name being called rises, holds up his right hand, and says, "I swear." In the Chamber of Deputies it is the Minister of the Interior who performs this duty.

In the two Imperial Chambers of Germany, the Reichstag or Representative Assembly and the Bundesrath or Federal Council, as we have already stated, no oath or affirmation is required of the members. But in addition to the Imperial Parliament each State of the empire has its own separate Parliament. In these local Parliaments all members must take an oath of allegiance to their respective sovereigns and of obedience to the constitution of their respective States, except, it is said, in the case where the member happens to be in the service of the State, and consequently has already taken the oath of allegiance.¹ No affirmation of any kind is allowed to be substituted for the oath; and if a member refuses to take the oath, he cannot under any pretext whatever be admitted to the Chamber for which he has been returned.

In Prussia Article 108 of the Constitution provides "that members of both Chambers and all officials of Government must take the oath of fidelity to the King and the Constitution." The form of the oath and the mode of administering it in both Chambers are

¹ In the report by the British Embassy at Berlin the statement that in these local Parliaments oaths are taken is made without qualification. But in the report from Wurtemberg it is stated that after carefully looking through the rules and regulations of both Chambers of the Wurtemberg Legislature, no reference could be found to any form of oath or affirmation being in force with regard to members on taking their seats.

as follows. The President reads aloud a list of members not yet sworn which he has received from the Bureau. Having called upon each of them to answer to his name, he requests them to place themselves in the centre of the House. The members and strangers present having then been asked to stand up during the administration of the oath, and the doors having been closed, the President addresses these words to the members to be sworn: "Gentlemen, the oath which you have to take is this, 'I swear by God the Almighty and Omniscient, that I will be faithful and obedient to his Majesty the King, and will conscientiously observe the Constitution.' I shall read this formula out to you, and you will each raise your right hand and say, 'I swear it, so help me God.' After the word 'I' you will add your Christian and surname, and it is permitted to each of you to strengthen the oath by means of any form of confirmation that may correspond to your respective creeds."

In Saxony the oath runs thus: "I swear by Almighty God truly to maintain the Constitution, and always to the best of my belief and conscience to consider the inseparable weal of the King and country in my motions and votes." Members re-elected do not take the oath; they renew their obligations to the King and Constitution by shaking the President's hand and referring to their former oath. As in the other local Parliaments in Germany, no affirmation or other alternative formula is admissible.

In Saxe-Coburg and Gotha the oath is thus: "I swear as Deputy faithfully to maintain the Constitution, and to the best of my knowledge ever conscientiously to keep in view the welfare of the Duke and of the State. So help me God." The oath is taken by the Speaker or Chairman of the Legislative Assembly before a Ducal Commissioner, and by the remaining members before the Speaker or Chairman.

In Hesse-Darmstadt, according to the thirteenth article of the Constitution, the oath is taken by newly-elected members at the opening of the session either before the Grand Duke himself or before the Minister of State acting as his delegate, and by members elected after the assembling of the States, before the President of their respective Chambers. It is couched in these terms: "I swear allegiance to the Grand Duke, obedience to the Laws, and strict adherence to the Constitution, and I purpose in this assembly to assist in promoting only the welfare of the people to the best of my ability and according to my own personal conviction, and this I will do, so help me God." The oath is taken with the right hand raised above the head.

In the Grand Duchy of Baden, according to Article 69 of the Constitution of 1818, the oath prescribed is in these terms: "I swear to be faithful to the Grand Duke, to obey the Laws, to observe and maintain the Constitution of the State, and to deliberate in the Assembly of the Chambers solely for the safety and welfare

of the entire country according to my inward conviction and without favour to States or special classes. So help me God." The oath is administered in this fashion. The President of the Council of Ministers, or another Minister representing him *ad hoc*, invites the newly-elected members of either House to take the oath, he reads aloud the above formula, then he names them one after the other. Each member answers to his name from his seat; he raises his right hand and says, "I swear it." After the oath has been taken by the members, the Minister declares the diet open. If a member enters the Chamber for the first time after the opening of the diet, it is the President of the Chamber, not the Minister, who administers the oath. Where the Minister who presides at the opening of the diet is a member of one of the Chambers, the oath is administered to him by the President of the Chamber at the following sitting. The life members of the First Chamber of course take the oath only once, at their first entry. The other members of the First Chamber, nominated by the Grand Duke or elected by the corporations for a certain period, renew the oath every time they re-enter the Chamber upon a new nomination or new election.

In Bavaria, according to Article VII. section 25, of the Constitution, the oath taken by each member of the Landtag, whether he be a Senator (Reichszath) or a member of the Chamber of Representatives (Abgeordnete), is as follows: "I swear to be faithful to the King and obedient to the Laws, to observe and maintain the Constitution of the State, and in the Assembly of the Estates to advise only that which is for the general advantage and wellbeing of the whole kingdom, without reference to particular grades or classes of society, according to my real and sincere convictions. So help me God and His Holy Gospel." This oath is read to the member, he raises his right hand, and if he be of the Christian religion, no matter of what sect he be, he repeats the words "I swear." If the member is not of the Christian religion, in reading the oath the words "and His Holy Gospel" are left out, and he uses the same form of assent, "I swear." If the words "and His Holy Gospel" should be read, the non-Christian member repeats the words "I swear, so help me God." Senators, as they hold their seats for life, take the oath only once. Of course members of the Chamber of Representatives take it each time they are elected.

In Switzerland the Federal Assembly consists of two sections, viz. the National Council and the Council of the States; the former being composed of deputies, 135 in number, from the Swiss people; the latter of deputies, 44 in number, from the cantons. The two Chambers have equal powers, and conflict of jurisdictions is avoided by the two Houses arranging between themselves at the commencement of each session as to which shall have the priority in dealing with certain questions. The oath in both Houses is administered in these terms: "In the presence of Almighty God I

swear to observe and maintain faithfully the Constitution and the Federal Laws, to protect the unity, honour, and independence of the country of Switzerland, to defend the liberty and rights of the people and citizens, and finally to discharge scrupulously the duties which have been intrusted to me. So help me God." Each member then repeats the words "I swear it." In 1875 an alteration was made, an affirmation being substituted for an oath in the case of members whose convictions would not allow them to take an oath. In that case, for the words "In the presence of Almighty God, I swear," the words "I solemnly promise" are substituted, and the final words "So help me God" are omitted. The oath or affirmation is administered in this way. It is read aloud in the Chambers, the doors of which are closed, by the "Chancellor" of the Confederation, and the member says, "I swear it," or "I solemnly promise it," as the case may be.

In the United States there are two oaths or affirmations taken by the members of the Senate and the House of Representatives (and it may here be remarked parenthetically that the member may either swear or affirm at his option, and if he affirms no inquiry is made as to his reason for affirming instead of swearing), one the original oath or affirmation prescribed by the Constitution of the United States, the other introduced in consequence of the Southern secession. The form and manner of taking the oath or affirmation first referred to is regulated by the Act of June 1, 1789, passed in execution of the sixth article of the Constitution. It is as follows: "I, A. B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States." At the first session of Congress after a general election this oath or affirmation is administered to the Speaker by any one member of the House of Representatives, and by the Speaker to all the members present, and to the members who afterwards appear, before taking their seats. The procedure in the Senate is the same. The members of the several State Legislatures take the same oath. The form of the other oath or affirmation is prescribed by the Act of 2nd July 1862. It is too long to quote, but in substance it is an oath of allegiance, containing a declaration that the member had never voluntarily borne arms against the United States, nor given aid or countenance to persons in armed hostility thereto, or yielded a voluntary support to any pretended Government within the States hostile thereto, and also an oath or affirmation of fidelity to the United States. After the collapse of the South and the reunion of the States, gradually Southerners resumed their position in Congress. Of course such an oath could not be taken by persons who had been engaged in the rebellion (as the Northern party called it). Accordingly the Act of July 11, 1868, was passed providing for the case of such persons from whom all legal disabilities had been removed by a vote of two-thirds of each House. The form provided by this Act is in these terms:

"I, _____, do solemnly _____ that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

"Sworn and subscribed before me, _____, a _____ in and for the _____, this _____ day of _____ A.D. 18 _____."

In his "Essays on the Administrations of Great Britain from 1783 to 1830" (p. 462, note), Sir George Cornwall Lewis has said, "It may be remarked that the attaching of importance to declaratory oaths, as a political security, is an indication of minds of a certain stamp and of a certain amount of intelligence which is nearly infallible." The innuendo is obvious. If the statement be correct, then the majority of minds in the United States and in the majority of the countries of Europe are "of a certain stamp and of a certain amount of intelligence." Nor can it be said that importance may not be attached to such oaths because the existing generation finding them in existence, having had them handed down to them by preceding generations, do not trouble themselves to sweep them away and allow them to remain. In the United States, as we have just seen, a new oath was devised simply and solely as a political security in the gravest national crisis which can possibly be imagined, a crisis which threatened the destruction of the nation.

D. C.

CHANCELLOR SETON.¹

WE have before us a Memoir of Alexander Seton, Earl of Dunfermline, who was President of the Court of Session from 1593 to 1605, when he was promoted to the office of Lord Chancellor. The author informs us that for some years he has been collecting materials for a work on the subject of the Presidents. The Memoir of Seton is now published as a specimen of the proposed mode of treatment. A series of Lives of the Presidents would be a valuable contribution to the historical and legal literature of Scotland. In the work before us the career of Chancellor Seton is treated exhaustively, and the author has produced a volume full of interesting and suggestive matter. Alexander Seton was the third surviving son of George, seventh Lord Seton, by Isabel, daughter of Sir William Hamilton of Sorn and Sanquhar, High Treasurer of Scotland. He was born in 1555, and while still a boy was sent to Rome, where he studied for some time in the Jesuits' College.

¹ Memoir of Alexander Seton, Earl of Dunfermline, President of the Court of Session, and Chancellor of Scotland. By George Seton, Advocate, M.A. Oxon., etc. Edinburgh: Blackwood & Sons. 1882.

His talents were such that before he was sixteen he had enjoyed the honour of declaiming, before Pope Gregory XIII. and a company of prelates, "ane learned oration of his own composing, *De Ascensione Domini*." He is said to have taken holy orders, but before long he gave up his intention of being a priest, and commenced the study of law. Following the almost invariable custom of those days, he resided abroad for some years for the purpose of attending lectures in the Civil and Canon Law. He was called to the Bar of Scotland, it is supposed, in the year 1577. In 1586 he was appointed an Extraordinary Lord of Session, and two years later became one of the ordinary judges of the Court. In 1593, when about thirty-eight years old, he was raised to the high position of Lord President.

At this time the state of the revenue was alarming. Everything was going wrong. There was not even money enough to pay the salaries of the officers of the Crown. The Secretary of State went to London, and attempted to induce Elizabeth to remit certain sums of money which had been promised. It was in vain. There was nothing to be got from England. James suspected that, poor as Scotland was, he was not fairly treated by his Treasurer, Comptroller, and Collector. But he might not actually have dismissed them, had not a domestic incident called his attention to the fact that, while he was always in want of money, Queen Anne's councillors were always ready to supply her demands. The story is told by Tytler. On the 1st of January 1595 the Queen gave him the present of a purse full of gold pieces. "Where did you get this?" asked the King. "From my councillors," answered the Queen; "when will yours do the like?" The King dismissed some of his Ministers, and appointed the Queen's advisers to their places. The new officials were Lord President Seton and three of the judges, Lindsay, Parson of Menmuir, Elphinstone, afterwards Lord Balmerino, and Thomas Hamilton, afterwards first Earl of Had-dington. To these were soon added Walter Stewart, Prior of Blantyre, Sir John Skene, Sir David Carnegie, and Peter Young, Master Almoner. These eight persons were appointed Commissioners of the Exchequer, and from their number were known as the Octavians. The powers conferred on Seton and his colleagues were extensive. The entire management of the revenue was put into their hands. They had power to discharge and appoint inferior officers, to inspect the accounts of all public servants, to inflict penalties for offences, to fix the price of wine and corn, to manage the royal household, to put the customs up to auction, to control the coinage, and to superintend the conduct of all inferior judges. The rank, in Council and Parliament, of Officers of State was conferred upon them.

Powers so extensive could not fail to excite envy. It was declared that the King had bestowed on the Octavians the whole power of the State, and had kept for himself nothing but the bare

title of King. The gentlemen-in-waiting were up in arms. As the King had grown poorer they had grown richer. It was seen that the searching inquiries made by the Octavians would put an end to all chance of further plunder, and that the rigid economy of the new officers would stop much of the waste which had made life at Court so pleasant and luxurious. The Cubiculars, or bedchamber party, were, therefore, in violent opposition to the Octavians, the chief of whom, we are told by a chronicler of the time, "were President Seton, Sir James Elphinstoune, Mr. Thomas Hamilton, the King's Advocat, and Secretar Lindsay."

But Seton and his fellow-Octavians were not unpopular merely on account of their extensive powers or their financial reforms. James intended to restore the Popish earls, and the Cubiculars used this fact to bring about the ruin of the Octavians. The Church was alarmed, and the notorious minister Black was its spokesman. Black distinguished himself by his audacious abuse of both Queen Elizabeth and King James. He declared that Elizabeth was an atheist, and that James was a child of Satan. He was summoned before the Privy Council, but declined its jurisdiction. In this he was supported by his brethren, and a deputation was sent to the Octavians to inform them that they were responsible for all the troubles which menaced the Church. Seton pointed out to the King the necessity of bringing Black to trial. The Council met for the purpose. Black did not appear, and was condemned, in absence, for the slanders which he had uttered. This increased the indignation of the Church. The Cubiculars were more active than ever in their intrigues. A deputation of the Church party waited on the King to remonstrate with him. A disorderly mob surrounded the Tolbooth, where the Council was sitting. The rabble demanded that Seton and Hamilton should be given up, but they managed to escape in safety. On the following day the King issued a proclamation removing the sittings of the Court of Session from Edinburgh. This was a severe blow to the tradesmen of the city. The Churchmen, who had nothing to lose, were undaunted, and proposed to excommunicate Seton and Hamilton. This step, however, was delayed. The crisis, which was soon over, resulted in a drawn battle. A convention of the Estates was held at Holyrood, and the government of the Octavians came to a sudden end. On the other hand, the Privy Council passed an Act declaring that the rioters were guilty of treason, and the capital was punished by being forced to receive Lord President Seton as Provost for the next ten years.

In 1598 Seton was made a peer by the title of Lord Fyvie. In 1604 he was appointed one of the commissioners for the proposed union with England, and succeeded the Earl of Montrose as Chancellor of Scotland. "About the beginning of October 1604," says Mr. Seton, "the Earl of Montrose, Lord Fyvie, and the other

Scottish Commissioners proceeded to England, and there conferred upon sundry matters which concerned the Union. In order that this favourite measure of King James might secure the full benefit of Seton's legal knowledge and political sagacity, the Earl of Montrose (Thirlstane's successor) was persuaded to resign the office of Chancellor, which was bestowed upon Seton. In alluding to the appointment, Crawford states that Lord Fyvie 'was fully able, by his wisdom and learning, to support the honour and dignity of Scotland, in relation to the Treaty of Union, especially in matters of law, which no man better understood or could more solidly apply.' Seton's successor in the office of President of the Court of Session was James Elphinstone, Secretary of State, a younger son of Robert, third Lord Elphinstone, who shortly before was himself raised to the peerage under the title of Lord Balmerino." In 1605 Lord Fyvie became Earl of Dunfermline.

When the projected union with England was abandoned, James turned to his lifelong task of destroying the Presbyterian Church. In this he could not hope to succeed so long as the independence of the General Assembly was preserved. In 1603 he had prorogued the Assembly. In the following year it was again put off. In 1605 an Assembly was held at Aberdeen in July. Few ministers attended, but a Moderator was chosen, and those present were about to commence business when a letter from the Privy Council was read ordering the Assembly to dissolve and not to meet again without authority from the King. It was agreed to adjourn till autumn, but the right of his Majesty to control the proceedings of the Church Courts was formally denied. Forbes, the Moderator, and others of the clergymen were arrested and confined in Blackness. Two days after the arrest of the ministers the plague broke out. This was regarded as a symbol of Divine anger against the conduct of the Government. Chancellor Seton was punished by the loss of his eldest son and niece. "He was beaten," says Calderwood, "by the curse pronounced by Joshua upon the builders of Jericho."

The ministers were imprisoned in July. In October they were summoned to appear before the Privy Council on a charge of seditiously convening an Assembly at Aberdeen. They answered by declining the jurisdiction of the Privy Council. A few days after the "declinature" had been signed the Gunpowder Plot was discovered in England. When the news reached Scotland it was thought that the King's anger would be turned from the Presbyterians of Scotland to the Papists of England. But James declared that "the Papists were seeking his life indeed, but the ministers were seeking his crown, dearer to him than his life." Orders were sent to Chancellor Seton, Lord Advocate Hamilton, Secretary Elphinstone, and Sir David Murray, the Comptroller, to indict the clergymen on a charge of treason.

The trial, famous in the annals of the Church of Scotland, took

place on the 10th of January 1606. The presiding judge was Justice-Depute Hart. Seton and other members of the Privy Council sat on the Bench as assessors. Hamilton prosecuted. Hope, afterwards Lord Advocate to Charles I., led the defence. The relevancy of the indictment was disputed by Hope with a courage and an ability which laid the foundation of his future fame. But the Bench, if not corrupt, were prejudiced and intolerant. The defence was listened to with open impatience. When the pleadings were ended, Hart and Seton collected the opinions of the judges. "The votes were delivered by rounding (whispering) in their ear, which was beside the order observed in matters of small importance and to the greatest malefactors." The indictment was found relevant, and the case was sent to a jury. When the jurors retired to consider their verdict the Justice-Clerk was sent with them in violation of the law. For six hours they discussed the case, and at last a majority had made up their minds to acquit the prisoners. But a juror, who had secretly promised to vote for a verdict of guilty, left the jury-room and told the Privy Councillors that there was some danger of an acquittal. The Councillors took alarm. The jurors were threatened and cajoled until by a majority a verdict of guilty was returned.

At the trial Chancellor Seton did not protest against deeds which he must have known were not only unfair but even illegal. He seems to have taken an active part in the nefarious proceedings which led to the condemnation of the ministers. But he was soon after accused of having given his approval to the Aberdeen Assembly. Forbes had been called before the Council a short time after the Assembly at Aberdeen. Bishop Spottiswood noticed that the Chancellor addressed Forbes in terms which seemed to imply that there had been some previous dealings on the subject of the Assembly. The Bishop now circulated reports against Seton which reached the King's ear. Forbes declared that Seton had consented to the meeting at Aberdeen, but refused to come forward and lodge a formal charge against the Chancellor. Seton repelled these charges with scorn. He wrote to the King a letter, in which he denounced Forbes as a "condemned traitor," and asked whether he or Forbes is more worthy of credit. His friends at Court defended him. Prince Charles and the Earl of Salisbury used all their influence on his behalf. The King yielded to their representations, and the Chancellor remained in office and in favour. He was made a member of the English Privy Council; was Royal Commissioner in the Parliament of 1612; and continued to stand high in the estimation of the King till his death, which took place on the 16th of June 1622.

The authors of the "Historical Account of the Senators of the College of Justice" say with truth that "the Earl of Dunfermline's character must have been of no ordinary kind, when it extorted the

approbation of men so dissimilar as Spotswood and David Calderwood." This criticism is well founded. Most of the leading statesmen of that time gained the confidence of the King by unhesitating compliance with the policy which guided James in the affairs of Scotland. They are therefore seldom spoken of by the Presbyterians but in terms of dislike. But of Seton Calderwood says, "He was a good justiciar, courteous and humane both to strangers and to his owne country-people. But noe good friend to the bishops." On the other hand, Spottiswood declares that he fulfilled the duties of his office "to the contentment of all honest men."

We hope that Mr. Seton will be encouraged to publish memoirs of the most prominent judges who have filled the office of Lord President. In many cases the materials are scanty, but of some extremely interesting accounts might be written by any author who is acquainted with even the ordinary sources of information.

Reviews.

A Dictionary of English Law, containing Definitions of the Technical Terms in Modern Use, and a Concise Statement of the Rules of Law affecting the principal Subjects, with Historical and Etymological Notes. By CHARLES SWEET, LL.B., of Lincoln's Inn. London: Henry Sweet. 1882.

THE idea of a Law Dictionary has a good deal changed since in 1563 the first edition of the "Termes de la Leye" was published. That was a list of difficult and obscure words in parallel columns of English and French. It was not a statement of the ordinary rules of law, or a definition of the meaning of its ordinary terms. It was a book to which the lawyer of the sixteenth century referred when he was puzzled, but it was not a convenience for everyday business, and it would have been of no use in the hands of laymen. The same features will be found in the dictionaries of the seventeenth century; in Sheppard's "Epitome of 1500 'hardest Terms,'" which appeared in 1658, and in the "Law Dictionary and Glossary of Difficult and Obscure Words" (1679), by Thomas Blount, the author of that singular collection, the "Fragmenta Antiquitatis." To a certain extent, also, this seems to be the character of Cowell's "Law Dictionary and Interpreter of Words" (1727), although this book introduces the antiquarian specialty of ancient names of places and persons. But later in the eighteenth century another type appears. There is the "New and Complete Law Dictionary" of the learned Timothy Cunningham of Gray's Inn, one of the reporters in the King's Bench, *temp.* 1734-36, and the author of

a book on Simony, and another on the History of Customs. This aimed at giving in dictionary form a complete, though necessarily a very meagre, outline of the system of the law, as well in its principles as its exceptions, and in its normal phrases as well as in its "obscure and difficult terms." But the great dictionary of the eighteenth century was that of the famous Giles Jacob, the author of the "Law Grammar." His undying vigour was perpetuated through twelve editions, and called into existence many minor rivals, such as Burn, Potts, William, and Tayler. The venerable Jacob was, however, fated to be eclipsed by one of his own editors. We are all familiar with the bulk and weight of Sir Thomas Tomlins' "Law Dictionary," exhibiting the rise, progress, and present state of British law, together with copious information on trade and government. This is really an Encyclopædia of law for the benefit of those who cannot afford extensive libraries. It boasts of containing more general information and a wider range of subject than any other legal publication. The book is quite characteristic of its author. He was the editor of "Littleton on Tenures," and the colleague of Ruffhead and Runnington in the production of the "Statutes at Large." Tomlins naturally suggests our American brother Wharton. Probably no man ever had a style less suited to the writing of dictionaries. How slovenly it was in its native luxuriance may be seen in the original preface, where he quotes from "Burke on the Sublime and Beautiful," and promises the bewildered reader to illustrate his definitions of English law by a copious citation of the antiquities of Rome, Greece, and Judæa. Wharton quotes a very good motto for a dictionary from Pope:—

"Nor thus alone the curious eye to please,
But to be found, when need requires, with ease."

It may be doubted how far this principle was carried out in the first edition, and it is not surprising that Mr. Shires' Will had largely to rewrite the fifth and sixth editions. The book explains Latin phrases and commercial terms. The variety of its information may be gathered from the fact that about the last two titles are Zollverein and Zygostates! It is 1029 pages long, and it grows at the rate of 500 titles per edition. In America it seems to have been superseded by the large two-volume works of Bouvier, Abbott, and Burrill. In England two smaller dictionaries have recently been published. That of Brown (1874) has reached a second edition, and has also been edited by Sprague in America. It is good according to its kind, but the attempt to compress an "Institute of the whole law" into 579 pages 8vo is quite beyond the capacity of man. The work of Mozley and Whiteley (1876) is shorter, more popular, but much less accurate. The tendency of this book is to sink into the "Pocket Lawyer." In the United Kingdom we have no elaborate works like those of Dalloz in France and Holtzendorff in Germany. In Scotland the production of law-

books has always been sluggish, and still remains so, although there is much valuable law floating about in decisions which would be much the better of being stated in a systematic and connected form. Whether this is owing to the want of enterprise in publishers, or to the indolence of the Bar, it does not become us to inquire. The dictionary known as Morison's, and that by Lord Kames, are not dictionaries, but collections of decisions under legal titles arranged in alphabetical order. Early in the present century William Bell published a dictionary, which has always been a favourite work of reference. It is by no means a small book. It has been calculated that the printed matter equals in bulk the text of "Erskine's Institutes." Several of the articles on constitutional and international law are original, and otherwise the author has adhered as closely as possible to the words of the great institutional writers. In 1861 Bell was edited in a somewhat perfunctory and superficial manner by the late Professor Ross, and the younger members of the profession are not without hopes of seeing another edition before the final abolition of Scottish law and jurisdiction takes place.

The dictionary of Mr. Sweet, the title of which is at the head of this article, is a piece of excellent workmanship, and will in all probability become the standard dictionary of English law. The author informs the public that it is the product of ten years' labour, and so far as we have been able to examine it, the book shows many signs of method, reflection, and research. The true character of a dictionary can be detected only after lengthened use, but if the longer articles fairly represent the mass of the work, we may say it is original and well done. The definitions show considerable analytic power, and, what is a great comfort, they are written in intelligible English. There is no parade of obsolete and useless learning, but several of the titles show that the author's knowledge of law is based on the only sure foundation, a study of its history. As regards the sources quoted, these are partly text-books of recognised authority, and partly leading cases and statutes down to the date of publication in 1882. It is a good sign in a legal author that he refuses to be a single month behind the present day. Thus the English Conveyancing Act of 1881 is commented on, and in the appendix decisions are cited which modify or confirm the statements in the earlier titles of the book. This gives a pleasant sense of security to the reader. Mr. Sweet has not done us the honour of referring to any Scottish decision or institutional writer, but we are glad to observe references to such reliable authorities as the "Corpus Juris Civilis," the dictionaries of St. Bonnet and Maurice Block, and the great Encyclopædia of Holtzendorff. One interesting feature in this book is its scientific etymology of legal terms. In this matter Mr. Sweet would be the first to acknowledge his obligations to the great dictionary of Littré. It is impossible to conclude this notice without referring

to the admirable typographical arrangements of the book, which make the reading of it much easier and pleasanter than otherwise it might have been. The publisher is entitled to the credit of having produced the most handsomely printed legal work we remember to have seen. The printing is so good that it is difficult to find *errata* to satisfy the exigencies of reviewing. We may suggest that there are on page xv two spellings of the name Schmidt, and that on page 11 some words seem to have been unintentionally repeated in the article Account, sec. 11. Mr. Sweet, we observe, is still a student at Lincoln's Inn. This book ought to form a valuable introduction to the Bar. .

Essays in Jurisprudence and Ethics. By FREDERICK POLLOCK,
M.A., LL.D. Macmillan & Co. 1882.

It is not many months ago since we had the pleasure of recommending to our readers the best book in the English language on the law of Contracts. Its author, Mr. (or shall we Scots say Dr.?) Pollock, is again in print. This time his work is not one to lay aside for reference in actual business. It is rather a book to take up after business is over, when the practitioner, who aspires to be something more than a mere mechanic, turns his back on his desk and desires to hear the last word of a scientific jurist on current topics. Of the thirteen essays here collected from various magazines of ephemeral literature, more than one-half have a direct interest for the lawyer. We shall take this opportunity of noticing those which are likely to interest Scotchmen most. The first essay treats of the Nature of Jurisprudence, with special reference to three recent works, one of which is Professor Lorimer's learned book on the "Institutes of Law." It is long since we in this *Journal* anticipated the criticism of this work which we here find—a criticism which was inevitable at the hands of an Englishman brought up at the feet of Austin. Full credit is given—it is impossible to exaggerate in this respect—for the marvellous beauty and lucidity of the style, the ingenuity to be found everywhere, and the good sense to be detected every here and there in the book. But Natural Law, as there explained, which is a hybrid of political economy and personal morality, is no more to Mr. Pollock's taste than to ours. And "positive law" runs into a mad transcendentalism when, instead of meaning the actually existent law in any given country at any given time, it is made to denote the law of Utopia (the Utopia of the nineteenth-century perfectionist), the law which would exist if, in the best of all possible worlds, legislators and judges were perfectly wise, and other circumstances remained much the same as now. It is surely not too late to insist that what may be a pleasant, though scarcely fruitful, speculation for the advanced jurist ought not to be hurled at the head of a

first-year student, however metaphysical a Scot he may be. If such is still to be their fate, an antidote is at hand in Mr. Pollock's second essay, which treats of the Laws of Nature and the Laws of Man.

The essay on Some Defects of our Commercial Law is sketchy and scarcely repays perusal. The Law of Partnership, on which the next paper dilates, is the author's pet subject. We faintly hope that the Bill of which he is the compiler may find its way through Parliament this session, along with the cognate Bill on Negotiable Instruments, as the first instalments of that Code for which most reasonable business-men long. It is a curious speculation, which is scarcely satisfied in these pages, why partial partnerships or partnerships *en commandite* have never been acclimatized in these isles, as in all other civilized parts of the world. The suggestion of private enterprise instead of public compulsion in the registration of private firms and their members seems to have met with little favour among the bankers to whom the paper was first read. It is obviously inadequate, and ill-suited to a community which relies more on Government protection than do the citizens of the United States. It is found in practice that the register of mortgages enforced on joint-stock companies by the Companies Act of 1862 is not invariably written up conform to the statute; and the intervention of a public official seems no less necessary to the proposed registration of private firms.

The essay relating to the Liability of Employers for the results of accidents contains the familiar warning against trusting to analogy in arguing a point of law; yet the *rationale* of the doctrine of "*respondet superior*" is sought in an analogy between private property and a trader's business or undertaking. The truth is that the key to responsibility in both cases is to be found in the law of *culpa*, which lies at the root of our common law in all its departments civil and criminal, and has no special relation either to commercial law or to the law of ownership. In cases between master and servant, where the servant has been injured in the course of his employment, the sole difficulty is to determine in what circumstances *culpa* may be imputed to the master; and the law has practically returned by aid of statute to the old Scottish rule, that the master is liable for personal fault only, as in the furnishing of insufficient apparatus, in the choice of inefficient subordinates, and in the delegation of authority to persons who by the fact alleged are proved to have been in fault in the exercise of the authority delegated.

The paper on the Oath of Allegiance is too redolent of Bradlaugh to admit of a patient perusal in these latter days.

The essay on English Law as a Branch of Politics is, on the contrary, a model of pleasant popular lecture-making, in which the necessity of a legal clue to the intricacies of the English annals is illustrated by citing as examples Magna Charta, the Petition of Right, and the Bill of Rights.

In the last paper which we can here notice, the Legislation of the Courts, by means of Case-Law, is shown to be an art founded on a science of induction which is just as formal and absolute as any of the natural sciences, and liable to the charge of technicality, just as and in no greater degree than these. The parallel is very neatly carried further in these words: "Acts of Parliament might at first sight be likened to catastrophic events which cannot be predicted; but it is easily seen that this would be a hasty and imperfect simile. For their actual operation is not to produce catastrophic results, but to introduce new sets of conditions which must be taken into account in future predictions."

The Month.

Report of the Committee of the Faculty of Advocates on the Entail (Scotland) Bill, 1882.—As stated in the memorandum prefixed to the Bill, the leading objects of the Bill are—(1) to give increased facilities to entail proprietors to disentail their estates; and (2) to enable them to convert their entailed estates into money, the price of the land sold remaining subject to the restrictions under which the entailed lands were held.

The provisions of the Bill are substantially the same as those of the "Entailed Estates Conversion (Scotland) Bill," which was brought into the House of Commons last session by the Lord Advocate and the Home Secretary, and which was approved of generally by the Faculty of Advocates. The present Bill, however, gives effect to several of the recommendations of the Faculty with reference to minor provisions; and it appears to your Committee to be an improved version of the Bill of last year.

The main points in which the present Bill differs from the Bill of last year are—(1) that, following the recommendation of the Faculty of Advocates, it omits those provisions of the Bill of last year under which entails were to come to an end *without the necessity of an instrument of disentail*, upon the mere occurrence of the event or events which, under the present law, create a power in the heir in possession to bring the entail to an end; (2) that it, however, enables the creditors of an heir in possession who is entitled to disentail but refuses to do so, themselves to carry through a disentail; (3) that it assimilates more completely than was proposed by the former Bill the position of heirs holding under entails made after 1st August 1848 to that of heirs holding under entails made prior to that date; (4) that it extends the provisions of the Act of 1875 (authorizing the Court in an application for disentail to dispense with the consents of the second and third heirs, on their interests being valued and secured), by

declaring that these provisions shall apply also to the case of the nearest heir and to all entails; (5) that it enables persons under age or subject to other legal incapacity to give consent to any application under this or any of the other Entail Acts, through a curator appointed by the Court; and (6) that it makes special provision for the case of an heir whose consent is required to such an application, but who is absent from Scotland, or has disappeared.

Your Committee by a majority approve of the whole provisions of the present Bill, subject to the following observations on its various sections. The Committee are unanimous in their approval of the part of the Bill relating to the conversion of entailed estates into money. They consider that this will remove one great obstacle to the freedom of commerce in land, without injuriously affecting any pecuniary vested interest. It is stated in the memorandum prefixed to the Bill that this part of the Bill is in effect substantially the same as Lord Cairns' Settled Land Bill, which has already been passed by the House of Lords.

Having regard to the expediency, for the sake of all parties concerned, of giving to purchasers an undoubted title, your Committee consider it of great importance that there should be added to the Bill a clause in terms similar to those of section 24 of the Act of 1853, declaring that every judgment and decree pronounced upon any application under the Act shall, after the time allowed for an appeal to the House of Lords, be no longer reducible as regards purchasers and other third parties acting *bona fide* on the faith thereof, on any ground of irregularity, or non-compliance with the provisions of this or of any other Entail Act.

The Committee further think that there should be added a clause, in terms similar to those of section 9 of the Bill of last year, to the effect that the whole costs of a sale shall be considered debts of the estate, to be defrayed out of the proceeds of the sale.

Before proceeding to refer in detail to the sections of the Bill, your Committee think it right to call the special attention of the Faculty to the only question of importance on which they are divided in opinion, viz. whether consent of the nearest heir should not in all cases be indispensable to disentail proceedings. This question is raised by section 7, the rubric of which is, "Consent of nearest heir may be valued and dispensed with." From the manner in which this section is worded, especially from the manner in which it refers to the provisions of the Act of 1875, your Committee have, however, great doubt as to its intended scope.

The words "heir-apparent or other nearest heir" occurring in the second line of the section, may be construed as having either a somewhat restricted or a wide meaning. They may mean either: 1. The first of the heirs whose consents are at present sufficient in the case of old entails, under section 3 of the Act of 1848, which provides that an heir in possession shall be entitled to disentail, if he "shall have obtained the consents of the whole

heirs of entail, if there be less than three in being at the date of such consents and at the date of presenting such application, or otherwise shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir-apparent under the entail and of the heir or heirs, in number not less than two, including such heir-apparent, who in order successively would be heir-apparent," or, 2. Not only the first of the heirs above referred to, but also the heir-apparent whose consent alone is required under sections 1 and 2 of the Act of 1848, viz an heir-apparent born after the date of the entail in the case of a new entail, or born on or after 1st August 1848 in the case of an old entail. If the first be the sound construction of this section, the enactment does no more than abolish the exception made by section 5 of the Act of 1875, of "the nearest heir for the time, whether an heir-apparent or not," from the provisions of that Act in regard to valuing and dispensing with the consents of heirs to new entails, and extend to new entails the provisions referred to. But if the second be the sound construction of this section, then, wherever there is an heir-apparent born after the date of the entail in the case of a new entail, or born on or after 1st August 1848 in the case of an old entail, the heir in possession may disentail, paying, of course, the value of the expectancy of such heir-apparent. Whichever construction of this section may be adopted, the heir in possession will be able to put an end to the entail whenever he pleases to pay the value of expectancies, a curator *ad litem* being appointed under section 6 to any pupil or minor heir. But in the one case he must pay the value of the expectancies of all the heirs whose consents are required by section 3 of the Act of 1848, while in the other case he would require to pay the value of the expectancy of the heir-apparent alone, in every case in which, under the existing law, the consent of the heir-apparent alone is sufficient. As your Committee are unable to discover any reason why an heir in possession should be called upon to pay the value of the expectancies of heirs whose consents to a disentail are not required, they are of opinion that the second of the two constructions referred to ought to be adopted, and that this section should be amended so as to make the matter perfectly clear. This may be done by substituting, in place of the words "the heir-apparent or other nearest heir," occurring in the second line of this section, the words "any person, whether heir-apparent or other heir," by substituting the word "person" for the word "heir" wherever it occurs throughout this section, by deleting the words occurring immediately before the proviso, "the nearest heir as well as to other heirs," and substituting therefor the words "all heirs of entail, whatever may be the date of the entail; provided that nothing herein contained shall render it necessary to value the expectancy and to dispense

declaring that these provisions shall apply also to the case of the nearest heir and to all entails; (5) that it enables persons under age or subject to other legal incapacity to give consent to any application under this or any of the other Entail Acts, through a curator appointed by the Court; and (6) that it makes special provision for the case of an heir whose consent is required to such an application, but who is absent from Scotland, or has disappeared.

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Having regard to the expediency, for the sake of all parties concerned, of giving to purchasers an undoubted title, your Committee consider it of great importance that there should be added to the Bill a clause in terms similar to those of section 24 of the Act of 1853, declaring that every judgment and decree pronounced upon any application under the Act shall, after the time allowed for an appeal to the House of Lords, be no longer reducible as regards purchasers and other third parties acting *bond fide* on the faith thereof, on any ground of irregularity, or non-compliance with the provisions of this or of any other Entail Act.

The Committee further think that there should be added a clause, in terms similar to those of section 9 of the Bill of last year, to the effect that the whole costs of a sale shall be considered debts of the estate, to be defrayed out of the proceeds of the sale.

Before proceeding to refer in detail to the sections of the Bill, your Committee think it right to call the special attention of the Faculty to the only question of importance on which they are divided in opinion, viz. whether consent of the nearest heir should not in all cases be indispensable to disentail proceedings. This question is raised by section 7, the rubric of which is, "Consent of nearest heir may be valued and dispensed with." From the manner in which this section is worded, especially from the manner in which it refers to the provisions of the Act of 1875, your Committee have, however, great doubt as to its intended scope.

The words "heir-apparent or other nearest heir" occurring in the second line of the section, may be construed as having either a somewhat restricted or a wide meaning. They may mean either:

1. The first of the heirs whose consents are at present sufficient in the case of old entails, under section 3 of the Act of 1848, which provides that an heir in possession shall be entitled to disentail, if he "shall have obtained the consents of the whole

heirs of entail, if there be less than three in being at the date of such consents and at the date of presenting such application, or otherwise shall have obtained the consents of the three nearest heirs who at the said dates are for the time entitled to succeed to such estate in their order successively immediately after such heir in possession, or otherwise shall have obtained the consents of the heir-apparent under the entail and of the heir or heirs, in number not less than two, including such heir-apparent, who in order successively would be heir-apparent," or, 2. Not only the first of the heirs above referred to, but also the heir-apparent whose consent alone is required under sections 1 and 2 of the Act of 1848, viz. an heir-apparent born after the date of the entail in the case of a new entail, or born on or after 1st August 1848 in the case of an old entail. If the first be the sound construction of this section, the enactment does no more than abolish the exception made by section 5 of the Act of 1875, of "the nearest heir for the time, whether an heir-apparent or not," from the provisions of that Act in regard to valuing and dispensing with the consents of heirs to new entails, and extend to new entails the provisions referred to. But if the second be the sound construction of this section, then, wherever there is an heir-apparent born after the date of the entail in the case of a new entail, or born on or after 1st August 1848 in the case of an old entail, the heir in possession may disentail, paying, of course, the value of the expectancy of such heir-apparent. Whichever construction of this section may be adopted, the heir in possession will be able to put an end to the entail whenever he pleases to pay the value of expectancies, a curator *ad litem* being appointed under section 6 to any pupil or minor heir. But in the one case he must pay the value of the expectancies of all the heirs whose consents are required by section 3 of the Act of 1848, while in the other case he would require to pay the value of the expectancy of the heir-apparent alone, in every case in which, under the existing law, the consent of the heir-apparent alone is sufficient. As your Committee are unable to discover any reason why an heir in possession should be called upon to pay the value of the expectancies of heirs whose consents to a disentail are not required, they are of opinion that the second of the two constructions referred to ought to be adopted, and that this section should be amended so as to make the matter perfectly clear. This may be done by substituting, in place of the words "the heir-apparent or other nearest heir," occurring in the second line of this section, the words "any person, whether heir-apparent or other heir," by substituting the word "person" for the word "heir" wherever it occurs throughout this section, by deleting the words occurring immediately before the proviso, "the nearest heir as well as to other heirs," and substituting therefor the words "all heirs of entail, whatever may be the date of the entail; provided that nothing herein contained shall render it necessary to value the expectancy and to dispense

with the consent of any heir except the heir-apparent, in any case in which, under the Entail Acts, the consent of the heir-apparent alone is required." So far the Committee are agreed; but the minority of the Committee are of opinion that in no case should it be possible to dispense with the consent of the nearest heir; in other words, they think that the exception made by the Act of 1875 should be continued. They think that to dispense with his consent is equivalent to the abolition of entails, with the probable result of the introduction of a system of life rent and fee, as to which reference is made to the remarks of the Committee on section 19 of the Bill.

Your Committee will now refer in detail to the sections of the Bill.

The preamble and sections 1 and 2 seem unobjectionable. See, however, the observation of the Committee on the schedule appended to the Bill, and referred to in section 2.

Section 3. After the word "existence," occurring in the sixth line of the section, insert the words "for the time." The first proviso seems unnecessary, in respect of the ample provisions of section 6; but if it is retained, it ought to be expressly made applicable to old as well as to new entails by the insertion after the word "necessary," occurring in the first line of the proviso, of the words "whether the entail is dated before, on, or after the said date." The second proviso, at the top of page 2, seems to have been framed for the purpose of making applicable to new entails the provisions of section 11 of the Act of 1848 with reference to old entails. This, however, would be made clearer by following more closely the phraseology of the section referred to. The word "or," occurring in the second last line, ought to be "and."

Section 3. From the punctuation of this section it might be supposed that the words "in like manner as if the entail were dated prior to the said date," occurring in the sixth line of the section, applied only to the powers mentioned in the immediately preceding line. To make it clear that they apply to all the powers mentioned in this section, substitute a comma for a semicolon in the fourth line, and insert the word "all" after the word "expenditure" in the fifth line. After the words "Entail Amendment Act, 1848," occurring in the eighth and ninth lines, the words "and of the Entail Amendment Act, 1853," ought to be inserted, in respect that section 6 of the latter Act amends the provisions referred to of the former Act.

Section 5. After the word "him" in the eighth line of the section insert the words "or them."

Section 6. This section enlarges the provisions of section 31 of the Act of 1848 with reference to the appointment by the Court of a curator *ad litem* to a person whose consent is required to an application to the Court, but who is unable to give a valid consent on account of minority or legal incapacity. The present section authorizes the Court to appoint either the legal guardian of such

person or another party to be curator *ad litem* to the person under disability, and confers upon such curator the power to consent on behalf of his ward, even where full age is expressly required under the existing Entail Acts, as in the case of the nearest heir under sections 1-4 of the Act of 1848 as amended by section 4 of the Act of 1875. It is plain that no curator *ad litem* will be disposed to exercise this very important power, unless he is secured from responsibility for an error of judgment. It is therefore very desirable to add to the present section a provision in terms similar to those of section 31 of the Act of 1848, that no curator *ad litem* shall incur any responsibility unless it is alleged and proved that he has acted corruptly in the matter.

Section 7. The provisions of this important section have already been adverted to. The word "opposed" occurring in the first line of the proviso is an incorrect expression, as section 12 provides that no creditor shall be entitled to oppose an application. The proviso should run thus: "Provided also that if any creditor of such person shall either hold infestment in the entailed estate, duly recorded, in security of his debt, or shall enter appearance and prove," etc.

Sections 8 and 9. The purpose of these sections seems unobjectionable. Insert, however, after the word "required," occurring in the second line of section 8 and in the sixth line of section 9, the words "or requires to be dispensed with;" and after the word "established" in the seventh line, and after the word "aforesaid" in the ninth line of section 9, insert the words "or their representatives."

Section 10. From the second part of this section it would appear that the provisions of the section are intended to apply not merely to the case of an heir in possession who is entitled to disentail without consents, but also to an heir who is entitled to disentail with consents, which under the previous provisions of the Bill may in all cases be dispensed with. This, however, should be made clear by the insertion after the word "estate" in the second line of the section, of the words "either by himself alone or with consents." After the word "application" in the fourth line from the end of the section, insert the words "or require to be dispensed with." There seems to be no reason why the power to disentail conferred by this section upon any creditor of an heir in possession should not also be conferred upon the trustee on the sequestrated estates of such heir.

Sections 11 and 12 seem unobjectionable.

Section 13. After the word "interest" in the third line of this section, insert the words "Under the Entail Acts."

Section 14. At the end of the first sentence add the words, "or partly for a feu-duty and partly for a price."

Section 15. The provisions of this section should be carefully considered, as upon them will depend the efficiency of the second part of the Bill. The questions which call for special consideration

are—in what securities the surplus price may be invested; whether the investments should be held by trustees rather than by a public official, such as the Accountant of Court; how the trustees are to be appointed; and what are to be their powers, liabilities, and immunities. As regards investments, the Committee think that the securities in which the price may be invested should not be more restricted than those specified in section 21 of Lord Cairns' Settled Land Bill. The Committee further consider that it may be difficult to get sufficiently responsible persons to act as trustees, unless the position of such trustees is better defined. In particular, the power given to the Court to accept the resignation of a trustee appears objectionable, in respect that it shows that such a trustee is not to have the ordinary power of resigning, and consequently suggests that he is not to have the usual powers and immunities of a gratuitous trustee.

The words "heir of provision," occurring twice in this section, ought to be "heir of tailzie and provision."

Sections 16 and 17 seem unobjectionable.

Section 18 is unobjectionable as far as it goes; but the Committee think that a further provision should be added, making it possible for the heir in possession, whenever a burden in the form of a definite capital sum of money becomes chargeable on a converted fund, to uplift and apply sufficient of the fund to pay off the burden.

Section 19 is unobjectionable as far as it goes; but the Committee think that the very general provisions of the section will not be found sufficient to prevent the introduction of a system of liferent and fee, which the Committee would regard as more objectionable than the present modified system of entail, in respect that liferenters have not the extensive powers conferred by modern legislation on heirs of entail in possession.

SCHEDULE.—The interpretation clause (section 2) of the Bill provides that the expression, "Entail Acts," shall mean the Acts mentioned in the schedule and this Act, and that they may be cited by the short titles therein mentioned. The Acts mentioned in the schedule are, however, by no means all the Acts relating to entailed estates; and the Committee have failed to discover any principle for the inclusion of such Acts as the Turnpike and Road Acts, and the exclusion not only of Conveyancing Acts, but also of the Acts relating to the sale of entailed superiorities, the sale of entailed lands to the Crown, or to public bodies with compulsory powers, or for redemption of the Land-Tax, or for the erection of churches and manseas. There does not, however, appear to be any practical objection to the selection of Entail Acts contained in the schedule; and it will be convenient to be able to cite them by the short titles therein mentioned, as the Acts prior to 1868 have at present no short titles.

Report by the Committee of the Faculty of Advocates on the Bills of Exchange Bill, 1882.—This Bill is intended to consolidate and codify the law relating to bills of exchange, promissory notes, and cheques. As it stands at present, it is drawn solely with reference to the law of England and Ireland, and it is mainly a digest of the existing law in those parts of the United Kingdom, with the occasional introduction of new rules or definitions in departments where the law is as yet unsettled. It does not include the rules of judicial procedure for the recovery of bills, nor does it codify the law of prescription or limitation, nor the law of evidence, in so far as specially applicable to bills. Although confined to the substantive law regarding the negotiable instruments with which it deals, its utility to the mercantile community in England and Ireland, in providing by legislative authority a compendium of rules which should be known by every man of business, is unquestionable. It is to be regretted, however, that it was not part of the original scheme of the promoters of this Bill to include Scotland within its provisions. It might with advantage have been framed from the first as a British code upon its subjects, intended, after due comparison and selection, to unite and combine the different local systems into one national whole. The expediency of having the same laws for the three kingdoms with regard to instruments of such common occurrence as bills of exchange is plain; and though Scottish lawyers are placed at some disadvantage in being asked, after the measure has been prepared in terms of English law and upon English authorities exclusively, to consider whether it can be accepted for Scotland, there is fortunately less difficulty in this than in almost any other branch of law in arriving at substantial uniformity. It is thought that this Bill should be passed for Scotland, subject to the following observations: Summary diligence upon bills and their sexennial prescription or limitation not being within the scope of this measure, the question remains, in what respects this Bill, if passed for the United Kingdom, would alter the law of Scotland; and whether any alterations are such as should be accepted or carefully provided against? In answering this question attention will first be directed to the main points on which this Bill as it stands would effect alterations in the law of Scotland. Some notes will, in the second place, be given on different clauses consecutively, as to changes which seem desirable to be made in Committee on the Bill, either to render it consistent with Scottish law and practice, or for its improvement generally.

FIRST.—1. The Bill adopts the rule of English law that where a bill is drawn payable to a specified person simply without the addition of any words authorizing transfer, it is payable to that person only, and is not negotiable (see clause 10). The rule in Scotland is that a bill or promissory note is essentially in its nature negotiable without any words expressly making it payable

to order or bearer. 2. The Bill adopts in clause 56, sub-section 4, another rule of English law, that a bill shall not operate as an assignment of any funds in the hands of the drawee available for the payment thereof, and that the drawee who does not accept shall not be liable to any effect on the instrument. By the law of Scotland, a bill or draft has the effect of an assignation by the drawer to any cash or money to the amount of the bill belonging to him in the hands of the drawee; and this assignation can be completed by presentment or other due intimation, so as to secure a preference against the drawer's creditors, and to give a right of action for payment against the drawee without acceptance. (See *Watts' Trustees*, 21st December 1853, 16 D. 279; *Carter*, 20th March 1862, 24 D. 925.) The same rule probably applies to cheques when granted for value (*Waterston*, 6th February 1874, 1 R. 470). The Scottish law on both these points was reported by the Faculty in 1854 to the Mercantile Law Amendment Commission as fit to be adopted in England. These Commissioners, in their Second Report, remark upon both subjects: "There is another difference prevailing as to the form of a bill or note, which we think it necessary to notice. In England or Ireland a bill or note is not negotiable unless made payable to order or to bearer. In Scotland it is. On the one hand, it may be said that the intention of parties is to be collected from their words, and if a bill or note is not in terms made payable to order or to bearer, it cannot be presumed that the parties intended it to be so. On the other hand, it has been observed that bills or notes are essentially negotiable instruments, and that it must be presumed that the parties intended them to be so, unless the contrary is expressed; and we think this the more convenient rule, and that in future throughout the United Kingdom, bills and notes should be negotiable unless the negotiation of them is expressly on the face of them restricted. . . . In Scotland, a bill of exchange operates from the time of presentment for acceptance as an assignment of debt, owing by the drawee to the drawer; but in England and Ireland, although bills of exchange and promissory notes are excepted out of the general rule that choses in action cannot be assigned, yet a bill has not the effect of assigning a debt or money of the drawer in the hands of the drawee. We believe that the Scottish law on this subject is productive of benefit; and as debts may be assigned in equity, we see no sufficient reason for refusing the same operation to bills of exchange in England and Ireland in this respect that they have in Scotland, and recommend that the laws of the several countries shall on this point be assimilated."

It is thought that if the promoters of the present Bill do not see their way to assimilation, by adopting the Scottish rule on both the points above mentioned, care should be taken, in so far as regards Scotland, to preserve the Scottish rule intact.

There is one peculiarity in the Scottish law as to bills, which

is not directly touched by the present Bill, though it might be incidentally affected by some clauses, such as 23, 30, sub. 2, 33, sub. 2. The point now referred to is the rule that the presumption of onerous consideration cannot be rebutted otherwise than by the writing or oath of the holder. This rule has already been to some extent trenchanted upon by the provision of section 15 of "The Mercantile Law Amendment (Scotland) Act, 1856," that with regard to bills lost, stolen, or fraudulently obtained, the onus of proving value is thrown on the holder. Recent decisions have also greatly relaxed the original stringency of this rule. The English rule, implied though not stated in this Bill, is, that proof of non-onerosity may be given by parole; and the like rule obtains in other cases where writ or oath is alone allowed in Scotland, as when the parties to an accommodation bill seek to recover from the person accommodated, contrary to their formal places on the bill, or when one acceptor seeks to recover the whole amount from his co-acceptor as the true principal debtor (*Catto, Thomson, & Co.*, 22nd Nov. 1867, 6 M. 54; *Swanson*, 3rd Dec. 1870, 9 M. 208). With regard to this restriction to writ or oath, the Faculty adopted in the Report of 1854, already referred to, the following opinion: "Your Committee are of opinion that it deserves consideration whether the English law should not be extended to Scotland, especially considering the recent alterations on the law of evidence." The Scottish rule of evidence on this subject has lately been condemned by a judge as "unreasonable in itself, and most mischievous in its operation" (*Ferguson, Davidson, & Co.*, 22nd Jan. 1880, 7 R. 500). It is thought important that opportunity should now be taken, in the application of this Bill to Scotland, to provide that proof to rebut the presumption of onerosity, or any other presumptions connected by law with bills, shall not be limited to writ or to oath on reference.

4. Care should be taken, in connection with clause 108, that the rules of Scottish Bankruptcy law are saved. (See the *Royal Bank of Scotland*, 15th June 1881, 8 R. 805.) The rules of common law, mentioned in the same clause, should be declared to mean in Scotland the common law of Scotland.

5. The provisions in sections 10 to 16 inclusive of "The Mercantile Amendment Act (Scotland), 1856," are in the main repeated, and therefore superseded by this Bill. Care, however, is required in scheduling these sections for appeal, that the proviso which saves the necessity of a notarial protest in order to summary diligence is not omitted. Further, the certificate of two householders, allowed by clause 104, to operate as a notarial protest where a notary cannot be obtained, should also be capable of being registered for summary diligence. Further, care should be taken in connection with the provisions of clause 53 that the present power of protesting against the acceptor, for summary diligence, any time within six months after dishonour should be preserved.

6. It is probable that, by the law of Scotland, when persons become parties to a bill as drawer and acceptor respectively for the accommodation of a third party, the acceptor, if he retires the bill, will not be allowed to recover any contribution from his co-surety. So much at least may possibly be inferred from *Beveridge*, 14th January 1852, 14 D. 329. This Bill (clause 64), if passed for Scotland, will place the accommodating parties in their true position as sureties for the party accommodated, being the principal debtor, no matter what may be their respective places on the bill; and it is thought that the justice of this result is unquestionable.

SECOND.—*Clause 3* to be deleted, and clauses to be framed providing under the qualifications above and hereinafter expressed for the application of this Bill to Scotland.

Clause 4. There are various English law phrases throughout the Bill, such as "holder in due course," defined in clause 32, "holder with notice," not defined at all, "equity attaching to the bill," for which, following the example of the Mercantile Law Amendment Act, 1856, Scottish equivalents should be used.

Clause 11, subs. 3. If the bill bears a date, interest should run from its date.

Clause 16. There should be a uniform rule as to holidays.

Clause 19, sub. 3. The general rule in Scotland is that one subscriber of several intended co-obligants is not bound unless the other co-obligants also sign. This rule appears to be just, and it should not be altered.

The phraseology of this provision is not clear.

Clause 23, sub. 2. The special purpose for which a bill is delivered could at present be proved only by writ or oath against the holder (*Glen*, 14th December 1849, 12 D. 353; *City Bank*, 12th May 1869, 7 M. 757).

Clause 24, sub. 2. Minors or married women engaged in trade may validly grant bills in Scotland; and this power was recommended by the Mercantile Law Commissioners in 1855. The phrase "person subject to legal incapacity" should be substituted for "infant" in this clause.

Clause 25. These provisions appear to assimilate the law of England to that of Scotland as to bills granted in name of a firm; and the saving of Scottish Bankruptcy rules already recommended, will prevent the Scottish distinction between the person and estate of the firm and that of the individual partners from being lost.

Clause 27 appears to state the rule as to procurations more absolutely than is just, according to the Scottish decisions (*Union Bank*, 17th March 1873, 11 M. 499). Some qualifying phrase, such as "was in good faith and on reasonable grounds believed to be acting within the actual limits of his authority," should be introduced.

Clause 29, sub. 1. This appears to be already the law of Scotland (*Brown*, 17th March 1875, 2 R. 615), but the phrase—"The repudia-

tion of liability," meaning thereby personal liability, "must be express"—might be improved.

Clause 30 in connection with *clause 5, sub. 4 b.* It is said that a bill may be validly granted in Scotland without any consideration (*Law*, 20th July 1876, 3 R. 1192); and it is certain that a bill may be indorsed gratuitously. It is thought that the present measure will not effect any alteration on the law of Scotland as to the consideration for obligations.

Clause 31, sub. 1. The definition of an accommodation bill is too limited, and is not consistent with sub. 3.

Clause 33, sub. 2. A bill affected with "duress," equivalent to force and fear, is by Scottish law null and void against the granter, even in the hands of an onerous indorsee (*Willocks*, M. 1519). The terms used in section 15 of the Mercantile Law Amendment Act of 1856 might be retained for Scotland.

Clause 34, sub. 4. It is against the principles of Scottish law to admit the "equitable assignment" of a bill or any other security by mere deposit. The right to compel implement of an obligation to indorse is undoubted; but questions of preference should depend on the date of actual transfer by indorsation.

Clause 36, sub. 5. This provision would deprive the special indorsement of its due effect, and it should not become law.

Clause 38, sub. 2. The terms of section 16 of the Mercantile Law Amendment Act, 1856, are preferred for Scotland, except as to the use of the words "indorse," "indorser," and "indorsee."

Clause 39. The negotiation of a bill back to the acceptor operates its discharge under clause 69, and it cannot be reissued by him.

Clause 43, sub. 1. It appears to be enough that the presentment for acceptance shall be made at the place of business, or failing such place, then at the residence of the drawee; but it is presumed that failure, after reasonable inquiry, to find the drawee personally, or his trustee or executor, will be excused under sub. 2.

Clause 53, sub. 1, appears to be inconsistent with sub. 4, as the latter is expressed, and with section 13 of the Mercantile Law Amendment Act, 1856.

Clause 53, sub. 8. The protest should, in Scotland, be in the shorter and simpler form there presently in use.

Clause 60 appears to express the result of the Scottish case of *Steele*, 14th June 1880, House of Lords, 7 R. 85.

Clause 70. Doubts are entertained as to the propriety of allowing verbal renunciation to discharge a bill.

Clause 72, sub. 1. The proviso should save the case of material alteration made unintentionally by innocent mistake of the holder, or by the malicious act or mistake of some person not the holder.

Clause 85, sub. 1. The power of a customer to countermand his cheque is recognised by *Waterston's case, supra*; but if the payee has received the draft for value he might still use and enforce it as an assignation in Scotland.

Clause 95, sub. 1. According to the law of Scotland, two or more makers of a promissory note, like the acceptors of a bill, are always liable jointly and severally unless the contrary is expressed. This should remain the law.

Sub. 3, same clause, appears to be extremely technical. If the partner has power to bind his firm by a bill debt, a promissory note by him in name of the firm would in Scotland bind the firm and all the partners jointly and severally; and this should remain the law.

The "Vigilance Association for the Defence of Personal Rights" have issued the following:—

The Civil Imprisonment (Scotland) Bill.—This Bill, brought in by Dr. Cameron, and read a second time and referred to a Select Committee on the 29th of March, proposes to abolish imprisonment for neglect on a man's part to contribute to the support of illegitimate children. The Committee of the Vigilance Association desires to call attention to the subjoined important letter, written by a man whose experience gives weight to his opinions, which describes the practical injustice that would follow such an alteration of the law, and reviews the cases cited by Dr. Cameron in support of it. The father's responsibility should be enforced not merely in justice to the mother, who is severely punished if she fails to maintain her illegitimate child, but as a matter of public policy. To leave such children to be brought up in the misery and destitution that entire dependence on the mother must necessarily produce, will not promote their becoming good and useful citizens.

The letter appeared in the *Glasgow Herald* of the 1st April 1882, addressed to the editor.

DALRY, Ayrshire, 30th March 1882.

SIR,—In yesterday moving the second reading of the Civil Imprisonment (Scotland) Bill, Dr. Cameron, as reported in the *North British Daily Mail* of to-day's date, referred to the case of William Walker; and as his statements, or rather misstatements, in regard to that case are calculated to mislead the public, and seem to have to a certain extent misled the House of Commons, I, as solicitor for the incarcerating creditor in that case, would, through the medium of your columns, lay the following statement of facts in regard to it before the public, leaving them to judge whether it is, as Dr. Cameron stated, an illustration of the harsh operation of the law on alimentary debts, or whether it does not rather show the strong necessity for maintaining that law in its present state. It appears that Dr. Cameron took such an interest in this much-injured person's case that he employed his own agents to act for him, and I think my statements will show what kind of person Dr. Cameron thinks it his duty to champion and protect, and whose wrongs, or supposed wrongs, he has thought fit to parade before the House of Commons and the public with the view of obtaining an alteration of a law already by far too lenient to the class of persons affected by it. On the 3rd day of May 1874 a girl named Anne Hill was delivered at Maybole of an illegitimate female child, of which she alleged William Walker, then a miner in Dalry, was the father. Walker refused to aliment the child, and on the 20th day of January 1875 Hill got a decree in absence against Walker in the Sheriff Court of Ayrshire, at Kilmarnock, for (1) £2, 10s. of inlying charges; (2) £8 per annum of aliment to her child for at least eight years, payable by equal instalments quarterly in advance;

(3) £3, 19s. 8d. of taxed expenses of process ; and (4) 4s. as the dues of extracting and recording the decree. Walker was charged on that decree to pay the foresaid sums of inlying charges and expenses of process, and £8, being four quarters' aliment to the child, which fell due on 3rd May, 3rd August, and 3rd November 1874, and 3rd February 1875. On the 12th day of February 1875 an arrestment was also laid against his wages in the hands of his employers, Messrs. Merry & Cuninghame, Glengarnock Iron-Works, Kilbirnie. Nothing was recovered by the girl under this arrestment or charge, and Walker thereupon lifted his wages almost daily, rendering it useless for future arrestments to be used, and she has never received a farthing for the upbringing of her child, now nearly eight years of age, although Walker is unmarried and has all along been earning large wages.

On the 3rd day of May 1880 a girl named Anne Bryce was delivered of an illegitimate male child, of which she alleged that Walker, then a pit-drawer, was the father. Walker again refused to aliment his child, and on the 28th July 1880 a decree in absence passed against him in the Sheriff Court at Kilmarnock for (1) £2, 2s. of inlying expenses ; (2) £8 per annum of aliment to the child for twelve years, payable quarterly in advance ; (3) £6, 10s. 10d. of taxed expenses of process ; and (4) 6s. as the dues of extracting and recording the decrees. He was on 11th August 1880 charged on this decree to pay the said sums of inlying expenses and expenses of process, and £4, being two quarters' aliment to the child, which fell due on 3rd May and 3rd August 1880, but he again took no notice of the charge, and, as Dr. Cameron says, he was on the 21st August 1880 incarcerated in Ayr Prison. He was apprehended the previous evening in his mother's house, and put every valuable out of his possession before going away with the sheriff officer, but it is utter nonsense for Dr. Cameron to say he was without funds or the power of procuring funds to aliment himself in prison till aliment was awarded to him by the magistrates. He was at the time earning on his own showing, when examined in cessio, from 28s. to 29s. per week ; and I have an extract from his employers' books showing that for the six months from February to July 1880, both inclusive, he earned an average monthly wage of £6, 4s. 3d., or 31s. per week. The truth is, he had his mind made up to do in Bryce's case as he had done in Hill's, namely, not to pay a farthing ; and he never offered to pay either of the girls anything till he was examined in his cessio application, as aftermentioned, when he offered to pay them, to liquidate past and future aliment, the handsome sum of one-sixth part of his future earnings, which of course would have been much or little, or even nothing, just as he thought fit. Dr. Cameron's statement of the poor sister being the support of Walker in prison and her aged mother out of it on her wage of only 6s. a week is no doubt very pathetic and telling if it were true. But Walker has beside this sister three brothers and two married sisters, all equally bound and quite as able as he and the unmarried sister to contribute to the support of their mother, and I have a certificate from the employers of the unmarried sister, dated 21st January 1882, which states that she "is a pieceworker here, and when the mill is running full time makes an average wage of about 10s. per week." As has been said, Walker was imprisoned on 21st August 1880, and Dr. Cameron's Act abolishing imprisonment for civil debt under certain exceptions (sums decerned for aliment being one of the exceptions) was passed on 7th September 1880, though it did not come into operation till 1st January 1881. As Dr. Cameron says, Walker, in terms of, as he thought, the provisions of that Act, expected to be released on the expiry of his year's imprisonment on 21st August 1881 ; but he was detained for another year for not making payment of £8, being four quarters' aliment to Bryce's child, which fell due on 3rd November 1880, and 3rd February, 3rd May, and 3rd August 1881—the year he was in prison. He then raised an action of suspension and liberation in the Court of Session, and Lord M'Laren held that his imprisonment after the expiry of the year was illegal, but on appeal the Lord President and the other judges who heard the appeal unanimously reversed the decision. Dr. Cameron first says that this action of sus-

pension was conducted for Walker by the agent for the poor, which means that it cost Walker nothing, although this did not appear from the proceedings in Court; but he then says that the appeal was "a somewhat expensive luxury, as an appeal costs money." All I can say is that I heard Walker swear the proceedings in the Court of Session cost him nothing. Walker thereupon applied for cessio in the Sheriff Court at Ayr (his only creditors being Hill and Bryce), and obtained interim liberation from prison till the application should be disposed of on getting Robert Muir, watchmaker, Dalry, and A. Riach, spirit dealer there, to become security for him to the extent of £21 that he would attend all diets in the process and return to prison if the application was refused. The application was before the Sheriff-Substitute at Ayr on four different occasions, and Walker got every indulgence; and on the 14th day of February 1882 the Sheriff-Substitute pronounced the following judgment:—

"The Sheriff-Substitute, having heard parties' procurators and considered the process, Finds that the pursuer is not entitled *in hoc statu* to the benefit of cessio.
WILLIAM A. O. PATERSON.

"*Note.*—The pursuer, an unmarried man, earning wages to the amount of 28s. or 29s. per week, has paid nothing to account of either of his alimentary debts, although one of them has been running on for eight years. As in his deposition he offered to pay one-sixth of his future earnings for behoof of his creditors, the Sheriff-Substitute adjourned the case to allow him an opportunity of finding caution, or making some provision for securing payment in terms of his offer. The agent for the creditors stated that he would be willing to accept any reasonable security that the offer would be implemented. But the pursuer has not made any proposal of security, or attempted to assure his creditors of his sincerity. The Sheriff-Substitute is not satisfied that the pursuer, who could get employment at once at wages of about 29s. per week, is not able to find caution, or give some security for the payment of a sixth of his earnings, or that he really intends to implement his offer.

"W. A. O. P."

This decision was appealed to the Sheriff Principal, who adhered to his Substitute's decision in the following interlocutor:—

"*Ayr, 17th March 1882.*—The Sheriff, having considered the appeal for the pursuer, with the reclaiming petition in support thereof, and whole process, Adheres to the judgment appealed from, and dismisses the appeal.

"N. C. CAMPBELL.

"*Note.*—It is a settled point that the pursuer is the father of the children for whose aliment decrees have been obtained. It was his first and paramount duty to aliment his offspring. He was and is an unmarried man, earning from 28s. to 29s. a week, and well able to aliment them, yet the aliment of one of the children has been running on unpaid for eight years or thereby, and none has been paid for the other. There can be no excuse for this wrongful and cruel conduct. It is an extremely bad case. What reliance can be placed on the simple promise of such a man unsupported by any kind of security whatever? It seems to be a very worthless affair. Surely, with relatives and friends about him, and himself able to earn continuously 28s. or 29s. a week, he should be able to find some reasonable security for the fulfilment of his promise. In short, the Sheriff takes the same view with the Sheriff-Substitute, in refusing the application *in hoc statu*.
N. C. C."

Dr. Cameron makes another statement which is utterly untrue: "At any rate, the Sheriff allowed Walker out for a fortnight, but he could not get any work, and returned to prison." He got an order for his interim liberation from prison on the 14th day of January 1882, on finding security to the extent before mentioned, which he found in a day or two afterwards, and was liberated, and he has not been reincarcerated since his liberation, and has been working for the greater portion of the time since he got out of prison. Indeed, I understand he could have been at work had he been so inclined a day or two after

his interim release. From the foregoing remarks the public will be able to judge of Dr. Cameron's so-called harsh illustration of the operation of the law on alimentary debts. I am well acquainted with his "travelling draper" illustration, and if the agent for the incarcerating creditor in that case, which is a very bad one also, chooses he can easily show, as I trust he will do, that it is an equally worthless "harsh illustration" with Walker's. If imprisonment is abolished for alimentary debts, I ask Dr. Cameron how a miner or pit-drawer, who has usually nothing but his wages to lay hold of, and who can lift his wages daily, can be compelled to aliment his illegitimate child, keeping in view that the Poor Law Act only authorizes imprisonment of the father of such a child when it becomes chargeable to the Parochial Board, and that an able-bodied woman with one child can get no relief from a Parochial Board. Dr. Cameron has graphically depicted the woes of the libertine and seducer in prison; but I can assure him that on numerous occasions I have seen the poor victim of the seducer's vile artifices, when turned out of her father's house, deserted by her friends and acquaintances, and without a penny in the world to support herself and her child, in utter despair ready to do anything, even to take away her own life, while the father of her child and the cause of her destitution and distress was earning large wages and living in comfort and even luxury. Would Dr. Cameron like to be in the position of a poor able-bodied mill-girl earning 5s. per week, without relations to help her, living in lodgings, and having a child besides herself to support out of her scanty earnings? In my humble opinion, if I may venture to express it, he would be far better occupied in devising means to make the position of the seducers of young women more unpleasant by making the law affecting them more stringent, than by promoting a Bill which, if passed into law, will simply encourage unprincipled artisans and others, with no houses of their own, or property of any kind save their daily wages, to gratify their licentious propensities, and ruin many women without the slightest fear or dread of any evil worldly consequences to themselves.—I am, etc.

WM. S. N. PATRICK.

Legal Cricket.—There is little doubt that golf is the game which is most popular with the legal profession in Scotland: not only does the Bar excel in that pastime, but many distinguished Senators of the College of Justice are amongst the keenest and best players of the day. We are glad to see, however, that the members of the Scottish Bar can hold its own in even more athletic exercises. On the 24th and 26th ult. a match was played between eleven members of the Bar and an eleven drawn from the officers of the Black Watch (42nd Highlanders), now stationed at Edinburgh Castle. The Bar team comprised some names well known in cricketing annals, and the result proved that their assumption of wig and gown had not detracted from their efficiency when clad in the less imposing but more comfortable garb of the game. The result of the match was that the Bar beat the Military by an innings and twenty-six runs: it may be interesting to note that in 1869, when the 42nd were last stationed in Edinburgh, the same match was played, but with a very different result, the soldiers having then an easy victory over the lawyers. In that year, however, the 42nd had an exceptionally strong team, and were seldom or never defeated during the whole season. The Bar had a very fair eleven, and we lately came across the record of another match which they played with Loretto School about the same period, and which they won easily. In the match last month Mr. Henderson

and Captain Eden were, we believe, the only players who had taken part in the contest of 1869.

Considering that most of the players for the Bar were quite out of practice, and that some of them had not touched a bat for many years, the display of cricket was very creditable. The Dean of Faculty (Mr. J. H. A. Macdonald, Q.C.), with his usual urbanity, gave a kind of official sanction to the whole affair by acting as umpire. We subjoin the scores.

42ND HIGHLANDERS.

<i>First Innings.</i>		<i>Second Innings.</i>	
Captain Wauchope, st. Mackenzie			
b. Laidlay	0	sub. b. Mackenzie	2
C. J. Eden, c. Gardiner b. Pearson	26	c. Pearson b. Laidlay	49
P. J. Livingstone, b. Laidlay	4	c. Lockhart b. Pearson	6
J. Home, c. Forbes b. Laidlay	43	st. Mackenzie b. Laidlay	21
T. Graham Stirling, b. Laidlay	4	b. Mackenzie	14
W. Eden, c. Pearson b. Laidlay	4	b. Laidlay	1
H. F. Elliott, b. Pearson	3	b. Mackenzie	14
E. Lee, b. Pearson	0	c. Patten b. Laidlay	1
H. H. Mowbray, b. Pearson	1	sub. not out	2
E. L. Speid, not out	2	b. Laidlay	0
G. M. Munro, b. Pearson	1	c. and b. Mackenzie	2
		Extras	4
Total	88	Total	103

THE BAR.

First Innings.

A. Pearson, b. Livingstone	101
W. J. Laidlay, c. Mowbray b. Livingstone	19
J. Patten, b. Livingstone	3
D. Dundas, b. C. J. Eden	40
C. K. Mackenzie, b. C. J. Eden	27
J. H. Forbes, st. Livingstone b. C. J. Eden	1
J. A. Gardiner, b. Livingstone	7
J. Reid, b. C. J. Eden	0
A. E. Henderson, b. Livingstone	4
D. Lang, not out	7
A. F. M. Lockhart, b. Livingstone	0
Extras	8
Total	217

Mr. ANDREW JAMESON, Advocate (1870), has been appointed Counsel to H.M. Department of Woods and Forests, in room of the late Mr. T. Ivory.

Bill-Chamber.—The following is the Bill-Chamber Roster for the ensuing long vacation :—

Friday, July 21, to Saturday, Aug. 5—	Lord FRASER.
Monday, Aug. 7, to " Aug. 19 "	M'LAREN.
" Aug. 21, to " Sept. 2 "	KINNEAR.
" Sept. 4, to " Sept. 16 "	SHAND.
" Sept. 18, to " Sept. 30 "	{ RUTHERFURD
" Oct. 2, to " Oct. 14 "	{ CLARK.
	LEE.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF ARGYLESHERE.

Sheriffs IRVINE and CAMPION.

CAMPBELL v. FLETCHER.

Tacit relocation—Novatio non presumitur.—Miss Campbell of Dunmore raised an ordinary action against her tenant, Peter Fletcher, for £40, the half-year's rent due at Martinmas 1881 for the farm of Clachaig and croft and house of Baun, which the defender continued to occupy by tacit relocation after Whitsunday 1881, when his previous lease of the subjects expired. The defence was that in November 1880 the defender had given to pursuer's factor verbal notice of renunciation of the lease as at Whitsunday 1881, and that in April following he had arranged with pursuer for a renewal of the set at a reduced rent. After probation the following judgments were given :—

Inveraray, 19th April 1882.—The Sheriff-Substitute having heard parties' procurators and made avizandum, Finds in point of fact (1) that the defender was tenant of the farm of Clachaig and croft and house of Baun on the estate of Dunmore, of which the pursuer is proprietrix, for six years from Whitsunday 1875 to Whitsunday 1881, at a rent of £80 per annum ; (2) that at Whitsunday 1881 the defender continued in possession of said farm, croft, and house ; (3) that no new lease, either verbal or written, was entered into between pursuer and defender : Finds in point of law that the defender having under these circumstances continued in possession, must be held to have done so by tacit relocation, and is liable to the pursuer for rent according to the amount paid under the lease during the preceding six years : Therefore decerns against the defender for the sum of £40 sterling, with interest thereon at the rate of £5 per centum per annum from 11th November 1881 till paid : Finds the defender liable to the pursuer in the expenses of this action : Allows an account to be lodged, and remits the same, when lodged, to the Auditor to tax and report.

GEO. CAMPION.

Note.—The defender's lease of the farm, croft, and house expired at Whitsunday 1881, but he continued in possession of the same after that date. Unless some new agreement can be shown to have been entered into between pursuer and defender, this tenancy must be held to have been by tacit relocation. There is no doubt but that during the months of March and April negotiations were pending between pursuer and defender as to making new terms as to the possession of the lands, but there is equally little doubt that no definite agreement was come to in the matter. This is clear from the evidence led on both sides, the subsequent agreement that the defender was to leave the farm and that the pursuer was to take over the sheep-stock, under which agreement arbiters on both sides to value it were appointed. It is absurd to say that this agreement was meant to imply that Miss Campbell was to take over and keep the sheep-stock and not to hand it over to any incoming tenant. She had sufficiently fulfilled her part of the bargain in seeing that when defender left his farm his stock was taken over in the usual course. It is the defender who throws up this bargain and goes back upon an uncompleted arrangement which had obviously been wholly abandoned by both parties. The factor for the pursuer verbally on 11th May, and by letter of 13th May 1881, informs the defender what the terms are to be if he elects to remain on, and he does remain on, alleging some arrangement with Miss Campbell which he is unable to substantiate.

"The item of £7, 5s. 9d. for sheep referred to appears to have been settled, and that of £6 for a shed which was to have been taken over by pursuer was part of the agreement which was afterwards abandoned, and stands or falls with it.

G. C."

Inveraray, 8th June 1882.—The Sheriff having considered the appeal for the defender against the interlocutor of 19th April 1882, with reclaiming petition for the defender, answers thereto for the pursuer, and whole process,

Dismisses said appeal and affirms the interlocutor appealed against : Finds the defender liable in the additional expenses of this appeal, allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and to report, and decerns.

ALEX. FORBES IRVINE.

"*Notes.*—The defender was tenant of the farm of Clachaig and house and croft of Baun, on the lands of the pursuer, for a term of six years from Whitsunday 1875, and at a rent of £80 a year.

"The present action concludes for payment of a sum of £40 of rent due by the tenant to the proprietor.

"It appears that in the month of November 1880 the defender gave verbal notice to the factor for the pursuer that he was to remove at the Whitsunday following, when his agreement came to an end.

"This notice was communicated to the pursuer, but no formal warning to remove was given to the tenant, and he remained in possession of the farm.

"The remark of Mr. Erskine (2. 6. 35) would thus, *prima facie* at least, be applicable to the state of things thus arising, that 'if the proprietor do not bring an action against the tenant for removing upon the warning, or if the tenant, notwithstanding his renunciation, continues in the natural possession without disturbance from the landlord, the parties are understood to have changed their minds, and the tacit relocation revives and subsists till a new warning or renunciation.' This legal principle of tacit relocation is clearly expressed by Lord Stair (2. 9. 22) in terms with which the other institutional writers on the law of Scotland are in exact accordance. 'Tacit relocation,' he says, 'is that which is presumed to be the minds of both parties after expiry of a tack when neither the setter warneth nor the tacksman renounceth ; for other significations of the alterations of their minds will not suffice, these being the habile ways of voiding tacks.'

"It is quite true, as argued by the defender, that this presumption as to the mind of the parties is not a *presumptio juris et de jure* which does not admit of contradiction or refutation, but an ordinary presumption which may be redargued or rebutted by competent evidence to the contrary ; and the case of the defender is in substance, that on the evidence of the *res gestæ* of the whole circumstances, and of the transactions between the parties, his continuance in possession of the farm is to be ascribed not to tacit relocation, but to a new and express agreement.

"It seems clear from what is laid down by the authorities on this head that the burden of proving such new agreement lies on the defender, and this is in accordance with another maxim of law, '*Novatio non presumitur*;' the substitution of a new obligation for one previously existing is not to be presumed, but must be proved by the party alleging it.

"In the opinion of the Sheriff the defender has failed in this proof.

"It is no doubt true that at several interviews between the parties, particularly that of the 20th April 1881, certain communings took place or proposals were made as to the defender's remaining on the farm at a rent less than half of that hitherto paid for it, and with an obligation on the proprietor to build him a new house, but the parties differed on various points. On this the pursuer on 21st or 22nd April wrote to the defender the letter No. 8 of process, suggesting that he should give up the farm. No answer having been received to this letter, she sent for the defender. In his own account of what passed he says, 'She sent for me to see if I would give up the farm. I said that I would if she would take over the sheep-stock, potatoes, and everything without trouble to me. She agreed to that.' It further appears that arrangement was made at the same time for the appointment of valuers on each side.

"It appears, therefore, to the Sheriff on the whole case that the defender has not proved a concluded agreement for his remaining on the farm at the reduced rent, and on the other terms alleged by him, and that the interlocutor of the 11th Substitute is right.

A. F. I."

-MacLachlan—*Alt.*—Wright.

THE JOURNAL OF JURISPRUDENCE.

THE REFORMATORY SYSTEM—SHOULD IT BE TAKEN OVER BY GOVERNMENT?

By SHERIFF SPENS.

A ROYAL Commission, as every one interested in the subject of destitute and neglected children knows, has, on the motion of Sir William Vernon Harcourt, been appointed to inquire into the present law as affecting juvenile offenders. Their labours will necessarily embrace a comprehensive inquiry into the working of the Reformatory and Industrial School systems. In the autumn of 1880 it was known that the frequent imprisonment of young children for petty offences had attracted the attention and indignation of the Home Secretary, and shortly afterwards, following the precedent set by Sir Richard Cross in connection with another socio-criminal problem (the question of whether the lash should be legalized as a punishment for brutal assaults and certain other offences), Sir William Harcourt issued a circular to Chairmen of Quarter-Sessions, Recorders, Stipendiary Magistrates, Magistrates of Metropolitan Police Courts, Borough Magistrates, Sheriffs in Scotland, and certain other officials. The circular directed attention "to the present state of the law concerning the treatment and punishment of juvenile offenders both under the General Criminal Statutes and the Reformatory and Industrial Schools Acts;" and a request was made that the recipients would "be so good as to consider in what way the law ought to be amended, especially with a view to the prevention of imprisonment of young children, whether on remand or after conviction." The answers received have now been published in a blue-book of considerable size, and a marked similarity of views as to the advisability of certain amendments of the law has been elicited, as well as a marked diver-

gence on other points embraced in the subject of inquiry. I think, accordingly, that it was the right result after this preliminary inquiry to move for the appointment of a Royal Commission; still it may be open to question whether a short Act might not have been passed this session dealing with one or two points on which there is a practical unanimity of opinion on the part of those having what may be called "skilled knowledge" of the subject. As a rule, piecemeal legislation is a mistake; but if it be known and admitted that social harm is resulting from a particular practice which legislation can at once remedy, then surely that is well done which is quickly done. Thus the enforced adjunct of imprisonment for a period of not less than ten days to every reformatory sentence is now so universally condemned that it seems hardly probable that any short measure introduced by Government proposing its abolition would be opposed. As experience shows, a Royal Commission (even though the report of its members is a careful and exhaustive one, and their conclusions are arrived at unanimously, or nearly so) is one thing and legislation upon it is another, *e.g.* the Marriage Commission, of which Lord Selborne was chairman, which sat so long ago as 1869.

There is one subject in connection with the treatment of juvenile offenders to which I desire to direct attention. It had not occurred to me at the time when I, in common with other magistrates, received and answered the circular referred to; but which the more I have thought over it, the more important has it appeared to me. The subject to which I refer is the question whether it is advisable that Government should take over the whole Reformatory system into its own hands. It can hardly be said that in the blue-book referred to there is any suggestion Government should take this course, but in the "Opinions and Suggestions of the Nottingham School Board," which appear to me able and clearly put, I find the following: "10. That before the Reformatory and Industrial Schools systems can be extended with advantage to the community they ought to be thoroughly remodelled by Parliament, and placed more directly under Government supervision and control; the coupling together of the two distinct kinds of schools should be avoided, and suitable classification of the cases attempted, as well as special arrangements made for short periods of sharp discipline which would be both deterrent and remedial."

I do not doubt that the result of the inquiry of the Royal Commission will be to advocate an extension of the Industrial School system and a minimizing of the Reformatory system. Of course those who are interested in the subject are aware of the real and supposed distinctions between Reformatories and Industrial Schools; still it may perhaps be useful to state briefly here what these differences are. There are separate statutes regulating Reformatories and Industrial Schools. Generally speaking, briefly stated, the chief and vital distinction between Reformatories and

Industrial Schools is that Reformatories are places of detention for children under sixteen years of age at the date of committal convicted of crime where means are supposed to be taken to wean from crime and to induce the leading of honest and respectable lives; whereas Industrial Schools are training-homes for children under fourteen at date of committal who, there is good reason to fear, if not looked after in this way may turn out useless, if not criminal, members of society. Children, however, under twelve years of age charged with a first criminal offence may be despatched to an Industrial School, and no child under ten years of age charged with a first offence can be sent to a Reformatory unless "sentenced in England by a judge of Assize, or Court of General or Quarter Sessions, or in Scotland by a Circuit Court of Justiciary or Sheriff" The 14th section of the Reformatory Act (29 and 30 Vict. c. 117) begins thus: "Whenever any offender, who in the judgment of the court, justices, or magistrate before whom he is charged, is under the age of sixteen years, is convicted on indictment or in a summary manner of an offence punishable with penal servitude *or imprisonment*," and proceeds to say that such offender may be ordered to be detained in a Reformatory after a term of imprisonment of not less than ten days. Under the words italicized above it has been held by various magistrates throughout the country that for certain mere police offences children can be sent to Reformatories. Thus, for instance, two children charged under the General Police (Scotland) Act of being vagrants because found sleeping in a close or common entry, were sentenced lately by a magistrate at Govan, near Glasgow, to ten days' imprisonment and five years' detention in a Reformatory; and I find from a table appended to the (1880) Report of the Government Inspector of Reformatories and Industrial Schools that no less than seventy-two children were despatched to Reformatories for vagrancy, and two for stone-throwing, in the year 1879. From a table appended to the (1881) Report it appears that eight children in the year 1880 were in Scotland despatched to prison for at least ten days, and to a Reformatory for "breach of the peace"! There are no committals under this head in England. In the year 1880 fifty-one were sent for "vagrancy." For throwing stones there was only one, I am glad to say. Since the decision of the Govan magistrate referred to, a case came before the judges of the Justiciary Court (the supreme Criminal Court of Scotland), and it was there authoritatively laid down that a Reformatory sentence cannot competently be awarded for petty police offences. In the year 1879 it appears that six children in England and eleven in Scotland were sent to Reformatories for assaults; in 1880 three in England and seven in Scotland. Assaults may be trifling or they may be serious offences, *e.g.* determined stabbing; but it is obvious that a sentence of ten days' imprisonment and five years' detention in a Reformatory is a punishment which in the ordinary run of assaults is monstrously disproportionate to the offence when committed by a child. Then

again it may be mentioned that out of the 1630 offenders despatched to Reformatories in 1879, no fewer than 1002 were sent on conviction of first offences, no fewer than 189 were under twelve years of age, and 11 were under ten years of age. Out of the 1656 offenders committed to Reformatories in the year 1880, 905 were sent on conviction of a first offence, 18 were under ten years, and 212 were under twelve years of age. It seems to me from this statement hardly possible to doubt—

(1) That children are frequently sent to Reformatories by magistrates interested in particular Reformatories with the primary object of keeping up such institutions ;

(2) That children are frequently sent to Reformatories because there is no available Industrial School in the district ; and

(3) That children are frequently sent to Reformatories when it is the worst thing possible for them.

The Reformatory should always be regarded as the *dernier ressort* for a child. As the law stands, he is stamped with the impress of the gaol ; he is ineligible for army or navy ; if the fact of his being a Reformatory boy leaks out in after life when he has got honest employment, fellow-workmen often refuse longer to work with him ; and, worse than all, it infers an amount of evil companionship from which it would require the best and strongest of natures to escape a certain amount of pollution. I can hardly believe that those magistrates who habitually or frequently send children for first offences to the Reformatory can ever have put the question to themselves, "What is best for the child before me ?" and have considered it with any practical knowledge of the subject. In connection with this point let me refer to the following passages from the reply of Major Inglis (the Government Inspector of Reformatories and Industrial Schools) to the circular of Sir W. V. Harcourt previously adverted to :—

"From our acquaintance with the subject, and from an examination of the cases recently brought under the special notice of the Secretary of State, I think that a large number of such children were sent to prison on very trivial pretexts for very petty, insignificant, and childish offences, and that it was possible and highly expedient to have dealt with a large proportion of such offences on sounder, wiser, and more humane principles. The objections to sending young offenders to prison are made manifest by the ill-effects produced upon their minds by the process. They become familiarized with the highest form of punishment suitable only for the adult. The deterrent effect of the punishment is very soon lost upon their minds. They lose character and good name in their own estimation as well as in that of others. They become insensible to shame and disgrace, and being stamped as 'prison birds' in their own place and neighbourhood, go from bad to worse, and become reckless, hardened, and dangerous. The offence is repeated, and another term of imprisonment follows, and so the child is gradually led on until he becomes a confirmed criminal and a

miserable, degraded being, past all reasonable hope of recovery. The Reformatory, it is true, has been enabled to grapple with a certain number of the more hopeful of such cases in the last few years, but familiarity with crime is a dangerous thing, and leads to mischievous ends. What seems to be wanted at the present time is to adopt such measures as may prevent a child, say under fourteen years of age, who can hardly be considered responsible for his actions, from being treated judicially¹ as an adult offender. The child acts thoughtlessly, foolishly, and recklessly; he is not of sufficient discretion to know the full consequence of offending against law and order. Throwing stones, breaking windows, using a catapult, letting off fireworks in the streets, trespassing for bird-nests, petty theft of fruit growing in an orchard, wanton and foolish damage to property, picking a turnip, plucking a flower, creating a disturbance or petty riot, quarrelling, causing an obstruction or petty annoyance, bathing in forbidden waters, selling things in the street without a licence, trying to obtain a livelihood in prohibited ways, and many other such petty misdemeanours do not need nor deserve the serious punishment and degradation of imprisonment."

This seems the language of common-sense, and yet, for such things as those above specified, it appears to be the case that magistrates not infrequently commit children to Reformatories after sentences of imprisonment. As pointed out before, for first offences no fewer than 1002 were sent to a Reformatory in the year 1879 and 905 in the year 1880. No doubt the large majority of these cases were first acts of petty theft or other dishonesty. In most of these cases I can hardly doubt such a sentence was injudicious in the extreme in the interests, not of the child only, but of the State.

What then is the conclusion deducible from these remarks? I think it clearly points to the fact that there is an unnecessary number of Reformatories in the country, and that there is an abuse of the present local Reformatory system, an abuse which is indirectly due to the Government grant for every boy or girl sent to a Reformatory. The grant at present allowed is 6s. per week, or £15, 12s. per annum, and this sum makes it an object of extreme desirability to many Reformatories to obtain inmates. Thus, for instance, a Reformatory has premises and a staff equal to the exigencies of 200 boys. It has only 150; 50 more boys at £15, 12s. per annum will give, so far as the 50 are concerned, a handsome margin of profit. From the (1881) Reformatory and Industrial Schools Report previously referred to it appears that the number of Reformatories in the country is 64, viz. 52 in England and 12 in Scotland. There are 44 Protestant Reformatories in England and 8 Roman Catholic Reformatories. There are 10 Protestant and 2 Roman Catholic Reformatories in Scotland. As at December 31, 1880, there were in England 3624 Protestant boys and 783 Protestant girls under detention, and 1159 Roman Catholic boys and 218 Roman Catholic girls. In Scotland there were as at the same date 792 Protestant boys

¹ Obvious printer's error corrected—it is "judiciously" in the blue-book.

and 121 Protestant girls, and 277 Roman Catholic boys and 96 Roman Catholic girls; in all, 7070 children. There are three Reformatory training-ships in England; none in Scotland. These three ships are of course included in the 52 English Reformatories noted above. One of these Reformatory ships is a Roman Catholic institution. I think the conclusion may fairly be deduced that social harm is being done by so many children being despatched to Reformatories at present, and in the interest of the nation I submit that it is desirable that there should be a diminution in the number of Reformatories.

But though this conclusion be arrived at, I think it is impossible to hold that Reformatories should be wholly abolished. It is necessary to guard against the contamination of Industrial Schools through hardened juvenile offenders. We would be doing injustice to the Industrial School system if the power of despatching juvenile, though previously convicted, criminals to some other place than an Industrial School were done away with; in other words, if all offending children had to be despatched to Industrial Schools, if sentenced at all. Then the limit of age in Industrial Schools at the date of order is fixed at fourteen, and the limit of age in Reformatories at sixteen, and there seems good reason for the distinction. It is strongly urged by many philanthropists that the law should be altered so as to make it competent to despatch to Industrial Schools children charged with first offences up to and under fourteen years of age, instead of merely up to twelve, as at present; and I cannot believe that children under fourteen charged with a first offence would be likely to do real injury to fellow-inmates if watched carefully and judiciously. The best chance, however, for hardened juvenile offenders, and for the State, though it may be a doubtful one, is to sever them from the guardianship that has been unable to prevent them from lapsing into crime, and to adopt a system of disciplinary training to honesty; and the only way in which this can be done appears to me by a Reformatory, or some institution of the kind. It is true that managers of Reformatories have the power of saying that they will not take boys under orders of magistrates; they are not bound to do so; but in many cases they are only too glad to get them, in the interests of the institution. Hence there is no attempt on their part in the general case to consider whether the case was one which it was desirable for the judge or magistrate to send to a Reformatory; but it would be a different matter if Reformatories were wholly national institutions, and some permanent official were connected with the system whose duty it was to consider whether the case was a proper one for the Reformatory to receive. This consideration leads me at once to the question, "Is it desirable that the Reformatory system should be taken over by Government?"

What, then, are the advantages which would be gained by the Government taking into its own hands the whole Reformatory

system? The consideration adverted to in the preceding paragraph I think is one. Again, in the year 1877 the whole prison administration, which until that date had been vested in local boards, was taken over by the Government immediately preceding that now in power. A reference to the debate on the second reading of the English Prisons Bill, as reported in *Hansard*, will suffice to show with sufficient clearness the grounds on which this was done. The Home Secretary, Sir Richard Cross, was chiefly responsible for the introduction and conduct of the measure through Parliament. With reference to the objection that the measure was one which interfered with the distinguishing feature of our country's administration, namely, local self-government, he said, "Then there was the fear of centralization. He would not yield to any man in his intense admiration and love for local self-government. In his opinion it was the great strength of this country. Nothing had made our country stronger or our constitution more likely to last than the great freedom of local self-government, which had been given not only to bodies in the country, but to our municipalities. He assured the House that he would never take one step wittingly to infringe upon the system of local self-government. He was for extending it as far as possible in order that the several localities might be free to govern themselves according to their several wants and requirements." Then, further on, the then Home Secretary set forth what was his all-important reason for the proposed transference. "For his part," he said, "he was entirely in favour of throwing upon the localities the expense of everything that was necessary and suitable for their management; but there was one thing in which the reason for throwing expense upon the localities failed. They could not do so where the object in view was to obtain uniformity of management, discipline, and punishment throughout the country, as in the case of jails. If they threw those duties broadcast over the whole country, the variety they got was fatal to uniformity. Therefore in taking the management of prisons out of the hands of the localities he contended that he was not depriving them of any power which they ought to possess. . . . The only object which he had from beginning to end in the Bill was to promote in the prisons of the country that uniformity of discipline, punishment, and management which he believed essential to the proper carrying out of the law." The same argument seems applicable with equal force to the case of Reformatories. Indeed, it might almost be said that the taking over of Reformatories by the Government is a corollary of the resolution to take over the prison administration. Unquestionably the reformation of criminals is much more a State question than a local one. Criminals, from the nature of things, are migratory in their habits. Therefore, the locality where the crime is committed for which sentence is awarded has only, as it were, a fractional interest in the criminal's future well-doing. The Government contribution,

moreover, is in many cases sufficient, indeed more than sufficient in some cases, for the boy's keep; and when, practically, the Government is really defraying the expense of maintenance, it seems only right that there should be the direct responsibility of seeing that the money expended is put to the best possible use for the end desiderated.

Again, as experience shows, and as every one practically acquainted with the subject knows, the lamentable number of Reformatory boys who become habitual criminals is mainly due to that large proportion of them who return to their so-called "friends." It appears to be the case that in almost all local Reformatories a system of visiting is allowed to be kept up between the inmates and their homes. Thus in the Duke Street Reformatory in Glasgow the lads are allowed out once a month or so, and even to stay away for a couple of days at a time. A riot took place the other day in this Reformatory, and at the initiation of this outbreak a gang of roughs gathered outside the institution and whistled and made signals to the lads inside. It is said that it is not wanted to make Reformatories prisons, but what is the only valid reason for sending to Reformatories? Surely it is because the proper guardians have either been training to crime or been unfit to keep from crime. In the best interests of the child it is desirable that the evil connection with criminal surroundings should be severed at once, and, if possible, for ever. If habitual communication is kept up after the despatch of inmates to Reformatories, in the natural course of things, at the end of the term of sentence, the lad returns to those haunts where the same incentives to crime exist that previously led him to its commission. Further, even supposing him anxious to get honest employment, it is not reasonably possible that he, known as a Reformatory boy in the locality of his criminal surroundings, can expect to obtain it. Thus the good but feeble resolve for honesty dies away, and the lad, as it were, is driven to the conclusion that the only method of earning a livelihood is to take to crime as an occupation. It is clear that if Reformatories are to remain local institutions, subject, it is true, to Governmental inspection, and the expense partly defrayed by Government, but still supposed to be primarily supported by local benefactions, rates, or contributions, it cannot be expected that the locality should contribute for the maintenance of inmates who are not connected with the locality. But once make Reformatories national institutions, then there is no difficulty whatever in severing the inmates from all present connection with the evil associations and surroundings of the locality of the crime on which the order of detention has been pronounced. Thus the Glasgow boys might be detained in a Reformatory in England, and, *vice versa*, English boys in a Reformatory situated in Scotland. We believe that it would be generally admitted by those who have studied the subject that the result of such complete severance

would have a very marked effect in diminishing the number of Reformatory backsliders, and thus good would result not only to the State, but it would undoubtedly be for the best interests of the boys themselves. With the sentimental objection to the alleged cruelty of separating parent from child I have no sympathy. In sending to a Reformatory the magistrate should be satisfied that the home influence has failed, and the parent, I submit, has no good reason to complain when the State says, "You have failed to keep your boy from crime, and therefore we must use the best means to prevent his becoming an habitual criminal." Nay, I think that the knowledge of such a severance being possible may act as a very wholesome deterrent to those evil guardians inclined to train to crime, or that other worthless section of the community who apparently regard with utter indifference the future of their children's lives.

But it may be said, Is Government to be put in the position of being the responsible guardians of such children? it is an unnatural responsibility for it to undertake! It is in the interests of the State of course that no child should become an habitual criminal. It is well known that although Reformatories are supposed to teach trades, a very small percentage indeed leave Reformatories fitted as journeymen to follow the trade which they are supposed to have been learning. Further, it is in the knowledge of those acquainted with the subject that certain occupations are carried on in Reformatories which do little or no good in the training of boys for the work of life, but which yield a considerable amount of pecuniary gain to the institutions. Again, I believe it to be the case that there are certain occupations, *e.g.* such as baking, which are allowed to be carried on in certain Reformatories and Industrial Schools that are of an unhealthy character, and the description of constitution and physique of such lads as are in the ordinary case to be found in Reformatories and Industrial Schools are not such as are calculated to bear with impunity the continued evil effects of such trades. Thus, although it may be the case that the baking trade may yield a certain percentage of profit, and lads might leave the institutions in which such trades were taught able to carry on as journeymen the occupation referred to, still the State will reap but little benefit if shortly afterwards ill-health comes on, and the bread-winner dies and leaves an unhealthy and feeble family to be taken care of by the Poor authorities. If Reformatories were national institutions, I think that surely more systematic training in healthy trades could be effected, and that in this way much better results would be obtained in the way of lads at the end of their sentence of detention being found qualified to carry on honest occupations as journeymen. It is so obviously in the best interest of the State to do what it can to prevent habitual criminality, that, while acknowledging there is force in the objection stated at the beginning of this paragraph, I still think that Government should be responsible

to this extent, viz. that they should see the lads qualified in some honest occupation before they part with them. If at the end of the period of sentence the lads were unfit for the trades selected, they might be detained until they were pronounced competent workmen by an inspector. Of course in these remarks I am proceeding upon the assumption that there is nothing in the lads, either physically or mentally, to unfit them for learning a trade; lads unfitted by physical or mental defect for learning trades are not proper inmates for Reformatories. It is outwith the scope of this paper to deal with the question of what should be done with such lads; but one of the most melancholy things, it appears to me, in the statistics of Reformatories is the considerable proportion of children dismissed on account of "disease" and "incurability."

There can, I think, be little question that there would be a saving of expense to the country generally by Government taking over the Reformatory system. The cost of inmates of Reformatories in some cases is very great, and the waste of space is sometimes excessive.

The following tables, compiled with some care from the statistics of the (1881) Report, will show that there is a great difference of cost per head in the Boys' Reformatories throughout Great Britain. The net cost per head brought out in the subjoined table is deduced by deducting from the gross outlay or adding thereto, as the case may be, the profit or loss on the industrial results.

	Average Number maintained.	Total Cost, 1880.	Net Cost per Head.
ENGLAND.			
1. Bedfordshire Reformatory	56	£1047 4 1	£18 5 10
2. Bradwell Reformatory, Cheshire	62	1147 0 0	21 7 5
3. Cumberland Reformatory, Carlisle	43	935 3 0	23 9 11
4. Devon and Exeter Reformatory, Exeter	32	756 15 11	22 14 1
5. Dorset Reformatory, Milborne, Blandford	44	693 4 9	13 1 5
6. Glamorgan Reformatory, Neath	66	1238 5 5	17 10 11
7. Hardwicke Reformatory, Gloucester	75	1371 15 3	18 17 7
8. Kingswood Reformatory, Bristol	148	3303 1 5	16 6 0
9. Hants Reformatory, Southampton	82	1789 16 4	24 5 8
10. Herts Reformatory, Ware	48	966 19 9	17 14 2
11. Liverpool Farm School, Warrington	144	2818 18 10	20 6 8
12. North Lancashire Reformatory, Garstang	122	2376 10 8	19 15 3
13. Manchester and Salford Reformatory, Manchester	72	2006 12 7	22 2 6
14. Home-in-the-East Reformatory, Old Ford, E.	54	940 13 0	15 4 9
15. Monmouthshire Reformatory, Pontypool	33	617 0 8	16 18 1
16. Buxton Reformatory, Norwich	53	1086 0 6	20 4 4
17. Northamptonshire Reformatory, Towcester	46	839 2 3	12 18 5

	Average Number maintained.	Total Cost, 1880.	Net Cost per Head.
ENGLAND.			
18. North-Eastern Reformatory, Morpeth	200	£3485 13 7	£17 16 11
19. Suffolk Reformatory, Thorndon	81	1171 19 8	14 8 5
20. Philanthropic Society's Farm School, Surrey	298	7164 9 11	23 19 6
21. Wandsworth Reformatory, Wandsworth	194	3795 6 0	18 3 8
22. Saltley Reformatory, Birmingham	81	1507 13 1	16 2 6
23. Warwickshire Reformatory, Leamington	80	1673 5 2	18 11 1
24. Wilts Reformatory, Warminster	70	1322 15 10	17 15 11
25. Woodford Reformatory, Worcester	40	775 2 10	20 9 5
26. Stoke Farm Reformatory, Bromsgrove	78	1433 16 10	19 8 7
27. Calder Farm Reformatory, Misfield	106	2152 1 10	20 11 2
28. Castle Howard Reformatory, York	75	1651 15 4	22 17 0
29. Leeds Reformatory, Leeds	145	2467 6 0	18 8 1
SCOTLAND.			
30. Old Mill Reformatory, Aberdeen	154	2733 6 10	6 7 8
31. Wellington Farm Reformatory, Edinburgh	107	2077 17 1	17 16 0
32. Rossie Reformatory, Montrose	72	1146 5 4	17 7 5
33. Inverness Reformatory, Inverness	74	1156 17 2	10 16 8
34. Duke Street Reformatory, Glasgow	159	3965 18 9	22 18 0
35. Kibble Reformatory, Paisley	83	1561 19 3	15 18 9
36. Stranraer Reformatory, Stranraer	91	1894 0 11	21 19 11
37. Reformatory School Ship, "Cornwall," Essex	244	5922 13 10	24 1 11
38. "Akbar" Reformatory School Ship, Liverpool	165	3551 18 0	21 15 4
ROMAN CATHOLIC.			
<i>England.</i>			
39. St. Edward's Reformatory, Boleyn Castle, Plaistow	184	3251 2 8	19 14 11
40. Birkdale Farm Reformatory, Ainsdale, Southport	196	2829 15 9	14 7 5
41. Mount St. Bernard Reformatory, Leicester	99	2416 7 1	24 6 10
42. Yorkshire Reformatory, Market Weighton	225	4145 5 1	18 1 6
<i>Scotland.</i>			
43. Parkhead Reformatory, Glasgow	201	3195 5 6	17 14 0
ENGLISH TRAINING SHIP (Roman Catholic).			
44. Reformatory School Ship, "Clarence," Birkenhead	223	4398 16 11	20 5 5

It will be observed that the Old Mill Reformatory, Aberdeen, stands first in the whole Reformatories for the cheap cost of maintenance. This results from the large amounts realized from

industrial profits, which yielded in 1880 no less than £1814, making the cost per head only £6, 7s. 8d. In the (1881) Report the Inspector says, "Old Mill stands the first in the Reformatory Schools for the able and successful manner in which her workshops are managed. Nothing that is wanted for their efficient development is refused. The industries comprise tailoring, shoemaking, leather [*sic*], and web and weaving by power. There is a considerable farm and large garden." In some cases there is a loss on the industrial results. Surely if there was uniformity of system throughout the country there should be no industrial loss in any case, and if Old Mill Reformatory can yield such a large profit on the industrial work of the boys the system carried on there should be inaugurated elsewhere, provided that system is really fitting its inmates for healthy occupations. I think the statistics given above show the extreme advisability of uniformity in system which would necessarily, it appears to me, result in saving of expense. As a rule it may be remarked that the Roman Catholic Reformatories maintain the boys intrusted to their care at less cost than the Protestant Reformatories do. Thus, for instance, the net cost per head for the Duke Street Protestant Reformatory in Glasgow is over £24 per annum, while the Roman Catholic (Parkhead) Reformatory in connection with Glasgow maintains its boys for an amount little more than the Government grant of £15, 12s. per head per annum. The number of boys in the Duke Street Reformatory is about 130, whereas there is accommodation for no fewer than 450 inmates, and at one time there were as many as 430 inmates. It is not necessary here to give the reasons for this decrease. It seems to me that it would be perfectly fair, if Government took over the whole Reformatory system, that the Reformatories throughout the country should all vest in the Government. Founders, whether merely private benefactors or locally-taxed communities, would not, I think, have any good reason to complain when Government undertook to discharge wholly, and, I believe, more effectually, the objects of the founders. That the number of Reformatories would be diminished throughout the country if they became national institutions there can be no doubt, because, apart from the diminution of numbers despatched to Reformatories, which I think will inevitably result from a remodelling of the Reformatory and Industrial Schools Acts, there would, of course, be no such waste of space as that I have instanced in the case of the Glasgow Duke Street Reformatory. In the short practical speech of Lord Advocate Watson, in moving the first reading of the Prisons (Scotland) Act of 1877, he stated, "We have been reducing the number of our prisons in Scotland very greatly of late years. Thirty years since we had 200 of these institutions, and they have been reduced to 56, of which 55 are managed by local boards. There are still a great deal too many of those local prisons. Some at times are nearly empty, others contain a popu-

lation of not more than from 5 to 10 at a time, and I believe the result of this measure would be to reduce the number very considerably, and to promote very largely economy and efficiency in the maintenance of those establishments," and the anticipation thus confidently indulged in has been partly fulfilled since the passing of the measure referred to. We may therefore anticipate, also, that the analogy will hold in the case of Reformatories if taken over by the Government. I see little reason to doubt that the Government allowance of £15, 12s. per head would be sufficient for the maintenance of the inmates of a Government Reformatory. It might be found necessary to build new Reformatories, or to remodel old ones; but the cost of such operations, I have no doubt, would be more than met by the sale of the present buildings and their sites. Indeed I think we may anticipate with tolerable certainty that a very considerable balance in favour of Government would remain over by such sale after all the expenses of the proposed transference had been defrayed. What then should be done with such balance? The two systems of Industrial Schools and Reformatories have been devised for the same philanthropic end. I have in a previous part of this paper stated my belief that the Report of the Royal Commission will, *inter alia*, suggest an extension of the Industrial School system. I venture to hope that in time competent and well-conducted Industrial Schools (over which I trust there will be a more systematic Governmental inspection and control than at present) will be available for the children of every district in the country. I do not, of course, propose that Government should take over the Industrial Schools. In the case of their inmates I admit that it is not in the general case necessary or advisable to remove altogether from the home influence. I think that it might be fairly provided that Government might give grants in aid of the establishment of Industrial Schools throughout the country out of such anticipated balance, a preference being given to localities in which Reformatories have been taken over. Indeed I think the establishment of Industrial Schools throughout the country is so eminently for the advantage of the nation that I think Government should have the power of giving grants in aid, even although there were no balance from the Reformatories taken over.

But, it will be asked, is it necessary that the Reformatory system as regards girls should be treated on the same national footing as is proposed with regard to boys? As matter of fact, I have in the above remarks been proceeding upon the assumption that the system must be taken up and dealt with as a whole. I am quite aware that according to the experience of those acquainted with the management of Reformatories and the results of the treatment there is considerably less difficulty in dealing with girls than with boys, and the proportion of girls to boys admitted between 1854 and 1880 inclusive has been 7478 only, as against 31,343. It is, I think, equally clear, however, with regard to the girls as

well as to the boys that the transference to the Government would (1) be of advantage in separating them from their criminal locality; (2) would lead to greater economy in the management of the Female Reformatories; and (3) would lead to greater efficiency by means of uniformity in discipline, training, etc. The number of girls detained in Reformatories in Scotland was in 1880 206 only, of whom 117 were Protestant, and 89 Roman Catholic. In England, excepting the Reformatory for girls at Fulham, of which no statistics are given, there appear to be altogether 674 Protestant girls and 230 Roman Catholic girls under detention; but it may be observed that in the Scottish Dalbeth Reformatory (which I believe from personal observation and otherwise to be a very well-conducted Reformatory under the supervision of the Nuns of the Order of the Good Shepherd) a considerable proportion of the inmates are English girls. I may here give, compiled from the 1881 Report, similar statistics to those given as to the Boys' Reformatories. It also brings out a very marked difference in the cost per head.

	Average Number maintained.	Total Cost, 1880.	Net Cost per Head.
PROTESTANT.			
1. Devon and Exeter Reformatory	57	£996 14 5	£15 15 0
2. Sunderland Reformatory	41	751 5 8	12 7 2
3. Red Lodge Reformatory	51	1164 7 2	22 6 9
4. Liverpool Girls' Reformatory	81	1793 0 8	18 16 4
5. Toxteth Park Reformatory	53	1071 6 11	16 14 9
6. Hampstead Reformatory	185	2769 16 6	16 9 8
7. Reformatory for Girls, Fulham		(No Statistics).	
8. Northamptonshire Reformatory for Girls	24	460 18 11	16 14 7
9. St. Matthew's Home for Girls, Ipswich	34	759 7 11	19 5 10
10. Surrey Girls' Reformatory	43	1078 10 2	25 4 4
11. Warwickshire Reformatory	43	697 1 2	12 8 3
12. Limpley Stoke Reformatory	51	1054 1 6	18 18 1
13. Doncaster Girls' Reformatory	52	1279 12 3	23 11 6
SCOTLAND.			
14. Aberdeen Girls' Reformatory	26	719 15 2	26 1 2
15. Dalry Reformatory for Girls	50	1085 10 11	20 1 6
16. Reddrie Reformatory for Girls	41	641 17 4	14 4 3
ROMAN CATHOLIC.			
17. Arno's Court Reformatory, Bristol	102	1530 4 9	15 0 0
18. Lancashire Reformatory, Liverpool	38	1102 6 3	29 4 10
19. St. Joseph's Reformatory, Sheffield	90	1742 16 7	14 18 6
20. Dalbeth Reformatory	89	1451 11 2	15 6 0

Thus in the case of two of the Reformatories the cost is under £12, 10s. per annum, whereas in one case it rises as high as £29, 4s. 10d.

It may be noted that certain of the Reformatories are in connection with other institutions. Thus the Dalbeth Reformatory for girls is under the same roof with a Magdalene Institution, and which, although wholly separate from the Reformatory, is also under the charge of the Nuns of the Order of the Good Shepherd, who reside in the Convent, which forms part of the same building. It could not of course be permitted for Government in such circumstances to take over the Reformatory part of such a combined institution as their own property. I admit that only those Reformatories whose premises are practically solely used for Reformatory purposes could be allowed to vest in the Government, but there are very few of such combinations as that above referred to throughout the country. I think further that such combinations are undesirable.

In conclusion, I venture to submit that if I have not proved the extreme desirability of Government taking over the whole Reformatory system, I have at least made out a case demanding a fair and impartial consideration of the question.

NINETEENTH-CENTURY STATE TRIALS.

SOME time ago we reviewed Professor Willis Bund's "Selection of State Trials." The learned author in that work gave a digest of the more important cases from the reign of Edward III. to the period of the Restoration. We trust that he may be induced to continue what he has so successfully begun. In the mean time another English lawyer, Mr. Lathom Browne, in his "Narratives of State Trials in the Nineteenth Century," has dealt with the period embraced in the first thirty years of this century, during which, as is well known, an injudicious State policy led to frequent and important legal proceedings. Mr. Browne's work, while resembling that of Professor Bund in size, is cast in a more popular mould, and extends beyond what can be strictly called treason trials. The object of the author may be stated in his own words: "It is proposed in these volumes to present in a popular form the incidents of such of the State trials during the first thirty years of the present century as appear most clearly to exhibit the political and social phases of that period, and as 'rich storehouses of curious and authentic facts illustrative of human character and conduct.' Hence the cases now given are not confined to mere judicial inquiries in our criminal courts, but embrace investigations by other competent jurisdictions—such as the humiliating inquiry instituted by the House of Commons in 1809 into the gross traffic in commissions and promotion in the army, and in civil appointments, through immoral female influence, and the claim to the Berkeley Peerage in 1811."

Mr. Browne will doubtless be prepared to hear his work characterized as too popular in point of form by the profession. There is,

however, a great deal to be said for a popular work of this description. Lawyers can and always will go to the proper sources for necessary information. They would never venture to quote such a book as this either to judge or jury, even were the author ten times more technical than he is. But the public generally, including those who are students, not of law, but of history, are fairly entitled to have legal narratives boiled down and presented in an easily-digested form. Nor is any harm done so long as no false impression of the law is carried away by the reader. We have, at least, in these two volumes a collection of facts illustrating the force of the saying that truth is stranger than fiction, and affording quite as exciting, and certainly far more useful, reading than the majority of so-called romances.

A glance at the table of contents is sufficient to show that Mr. Browne has made a very fair selection, looking to the object at which he professes to aim. We do not observe, it is right to note, any Scottish cases; and yet the extraordinary trials of 1820, originated by the wise Cabinet of the "First Gentleman," are surely deserving of a record in such a work as the present. We know that even English judges have been led easily to believe that there are no courts of competent jurisdiction in Scotland, and therefore ignorance upon the part of Mr. Browne, who is only as yet an English barrister, need not surprise us. But Mr. Browne has heard of Scottish Courts, because in his preface he almost undertakes to give an account of the Stirling Peerage case in some subsequent volume.

The impression which most of us have concerning the days of our grandfathers—that they were very favourable to the growth of all manner of abuses—will receive abundant confirmation from the pages of our author. And yet it cannot fail to strike us, that even then rank and influence were not always sufficient to protect the guilty, but that occasionally the State was found avenging the cause of very obscure victims. Of this fact a remarkable illustration is afforded by the very first case which Mr. Browne reports. It is, we think, remarkable that in 1802 a gentleman of position and highly connected should have been convicted and executed for having caused a soldier, many years before, to be severely flogged. Why, even in 1865 the cruelties which accompanied the suppression of the so-called rebellion in Jamaica led to nothing like a capital conviction. In 1802 the cat existed in all its glory, and floggings were matters of daily occurrence. In 1810 Cobbett was severely punished for having in somewhat vigorous language called attention to the infliction of five hundred lashes in the case of a few riotous militiamen. Sentences of eight hundred and even a thousand lashes were duly recorded in the newspapers of the period. It is true that Governor Wall's victim died, but it was after an interval and in hospital, and the affair, as we have stated, happened many years before the trial.

Wall was governor of the small island of Gorrie, on the north-west coast of Africa, an unhealthy place, with a climate rather encouraging a state of chronic mutiny. In July 1782, Wall, upon the ground that a rising had taken place among the soldiers, ordered a certain sergeant named Armstrong to receive 800 lashes, and the sentence was inflicted by negroes with a stout knotted rope, and resulted in the man's death within a week. Wall at the time was on the eve of leaving the colony, and did so immediately after this punishment was inflicted, taking up his abode in England. His successor furnished to Government such accounts of the alleged mutiny, and Wall's mode of suppressing it, as to lead to warrants being issued for his apprehension. "On the way to London, whilst at Reading," says Mr. Browne, "he escaped, got abroad, and for eighteen years the matter slept." In 1801, when of all the officers who had been with him in Gorrie, only one remained alive, he returned to England and gave himself up to the authorities. He was tried at the Old Bailey on the 20th of January 1802 before Chief Baron Macdonald. According to the evidence for the Crown, there had been no mutiny at the time of Armstrong's death—merely a deputation of soldiers seeking to have some grievance about their rations settled by the Commissary. But evidence was led on behalf of the accused, which, if to be believed, proved that the soldiers had behaved in a riotous manner, and even threatened the governor's life. His failure to report any mutiny at the time was, however, difficult to reconcile with the truth of the story now told on his behalf. The jury rejected it, and Wall suffered death upon the scaffold with every indication that his fate met with popular approval. Mr. Browne suggests that the almost contemporaneous execution of some mutinous sailors at Portsmouth swayed the decision of the Government, as "in the temper of the public they could not dare to spare the officer for brutality to soldiers, when they had so lately executed the sailor for resistance to his officers."

Certain legal proceedings narrated by Mr. Browne in the same volume give us some idea of the severity of the military discipline then exercised. Upon the 18th June 1810, Cobbett with his printer and publishers were tried for an article published in the *Register* upon military floggings at Ely in the previous year. For mutiny five militiamen had been sentenced to 500 lashes each, the punishment being inflicted by foreigners, members of the German legion quartered at Bury St. Edmunds. The success of this prosecution led to another. In his address to the jury Sir Vicary Gibbs, Attorney-General, had remarked that these mutineers "were not dealt with as Bonaparte would have treated his refractory troops." Leigh Hunt and his brother in their paper, the *Examiner*, taking these words as their text, indulged in a somewhat pointed comparison between the modes of punishment prevailing in the French and English armies. In doing so they were able to quote cases from the public prints of English soldiers receiving

750, 800, and even 1000 lashes. "Bonaparte's soldiers," the readers of the *Examiner* were told, "cannot form any notion of that most heartrending of all exhibitions on this side hell—an *English military flogging*." The article contained an admission that the military code must be distinguished from the civil by greater promptitude and severity, and Bonaparte was declared to be no favourite of the writers, but nevertheless the Government of that day deemed it expedient to try the Hunts. Their trial took place before a judge well adapted for the purpose, Lord Ellenborough. Brougham defended, and his defence was successful. The opinions of eminent military men unfavourable to corporal punishments were quoted with the view of showing that the question which the prisoners had discussed was a legitimate subject for discussion. "The reply of the Attorney-General," says Mr. Browne, "and the summing up of Lord Ellenborough drew the distinction between a fair and honest discussion by men capable of giving an opinion, and such an article as that now under prosecution, the mere form, let alone the language, of which excluded it from such a parallel. The jury, however, took the view that what Wilson and Stewart might write, and Abercrombie say, might be said by journalists in their own way, a way which the then unbounded licence of the press had made familiar to their ears."

Amongst the trials given is that of Viscount Melville, one which cannot fail to interest Scotsmen. In his day he was, if not the most eminent, the most powerful man in Scotland. The son of a Lord President, he became Solicitor-General in his thirty-third year. Few names appear more frequently in the numerous diaries, biographies, and histories relating to the latter half of the eighteenth century. Those of Pitt and Dundas are naturally associated. They laid their plots, drank their deep potations of port together, supported each other in the House of Commons. All Scotland, that is to say, the Scotland which Dundas recognised and approved of, benefited by his high position. The office of Lord Advocate meant something in his time: it meant unlimited patronage to be freely exercised in favour of his fellow-countrymen. The termination of a Lord Advocate's career is usually the Bench, and until lately it has been the Scottish Bench. He formed an exception. Murray, Wedderburn, and Erskine obtained the peerage and great English honours, but they had preferred Westminster to their national Parliament House, and sought professional fortunes in London. Dundas, as long as he continued to practise, was a Scottish lawyer. But no Lord Advocate since the Union has ever taken so active a part in general politics. Besides his high legal office, he held that of Treasurer of the Navy. Writing of the year 1783, Mr. Browne says, "The amount and variety of work undertaken by Dundas at this period was remarkable. In addition to that incident to his ostensible official positions, he not only continued his practice at the Scottish Bar in appeals to the House of

Lords, but assumed the responsibilities and the labour of the Government share of the affairs of India." He was chairman of the committee which inquired into the proceedings of Warren Hastings, and in this capacity moved in the House of Commons the resolutions which led to his trial. Dundas's enemies, while they gave him credit for a manly figure and a frank and good-humoured countenance, described his eloquence as grotesque and hoaxing, conveyed in a loud voice and a provincial accent. Fox said of him that "he never failed to speak with effect unless, by some strange fatality, he happened to thoroughly understand the subject." Upon the formation of the Addington Ministry he was created Viscount Melville, and after that ceased to have any connection with the legal profession. In 1804 he became First Lord of the Admiralty, reaching at this time the climax of his career. Clouds began now to gather round one who had hitherto been singularly fortunate. Certain commissioners had been investigating the office of the Navy Treasurer and the doings of Melville and his Paymaster Trotter. A comparison between the balances returned and those actually in the Treasurer's hands led to a series of resolutions condemnatory of his conduct, moved by Mr. Whitbread in the House of Commons on 8th April 1805. What Lord Melville and his Paymaster were charged with doing seems to have been the investing of Government funds for their own profit. The eleventh resolution affirmed that Lord Melville "having been privy to and connived at the withdrawing from the Bank of England for purposes of private emolument sums issued to him as Treasurer of the Navy, and placed to his account in the bank in accordance with the statute, has been guilty of a gross violation of the law and a high breach of duty."

The resolutions were carried after a keen debate by the casting vote of the Speaker. Lord Melville resigned. Pitt fought valiantly for his friend, but had to witness, if not actually recommend, the removal of his name from the list of the Privy Council. The distress which the whole matter caused the great statesman has been thought by some to have hastened his death. The House of Commons finally resolved, after hearing the late Treasurer in defence, to proceed by way of impeachment, which of course involved a trial before the House of Lords. "On the 29th of April 1806," says Mr. Browne, "the stately proceeding was commenced. Preceded by the clerks of Parliament, Chancery, and the King's Bench, the Masters, Sergeants-at-Law, and Judges, the Peers marched in, fully robed, beginning with the youngest and lowest order and ending with eight princes of the royal blood; Erskine, the Chancellor, being Lord Steward for the occasion." Three-and-twenty members of the House of Commons took charge of the prosecution, Whitbread, who had moved the resolution, opening the case in a speech which occupied the first day. Lord Holland has recorded an unfavourable opinion of the way in which this trial was con-

ducted. "Though," he says, "there were five or six managers, the articles were so ill-drawn that it was difficult to ascertain to which act of Lord Melville each respectively referred."

Mr. Browne has compressed the long proceedings which followed into a small compass; we must abridge still further. Several questions of law were submitted to the judges. They were asked whether it was a misdemeanour on the part of the Treasurer to apply any of the funds in his possession for navy service to any other use, public or private, without specific authority. This question was answered in his favour. But portions of these funds had been withdrawn from the Bank of England and deposited in Coutts' till required to meet navy accounts. The judges were asked whether such moneys could be drawn before these accounts became due, and lawfully lodged and deposited in the hands of a banker, other than the Bank of England, until payment of these bills, and whether such an act was an offence or crime at law, and whether until such payment they might be deposited in the hands of a private banker in the name and under the immediate sole control and disposition of some other person or persons than the Treasurer himself. The judges answered that such actings would constitute in law a crime or offence, but they drew the distinction between removing the funds for the purpose of making a private deposit and doing so "as the means or supposed means of more conveniently applying the money to navy services." Trotter, who evidently had led his chief into the scrape, was a man bent upon making a fortune out of the post (not a highly-salaried one) of Paymaster. In this he was successful. Beginning with a salary of £50, he never had more than £800 per annum, and yet he had to admit having realized out of his employment some £50,000. A monument of his money-making abilities exist, if we mistake not, in the shape of Dreghorn Castle near Edinburgh. When the Navy Office was removed to Somerset House he had represented to Lord Melville the risk of carrying large sums of money thither from the Bank of England. He had accordingly obtained leave to deposit the Government funds in the private bank of his relatives the Coutts, where they mingled with his own, and greatly to his benefit.

"It is to be regretted," says our author, "that no record of the numerous speeches made during these discussions has as yet been discovered. Lords Holland and Lauderdale, with the Chancellor and the Chief-Justice, exerted themselves for a conviction; but Erskine's ignorance of the forms of the House, to which he was so new, and Ellenborough's intemperance undoubtedly weakened the effect of their exertions. On the other side, Lord Melville's old colleagues, with the exception of Lord Sidmouth, headed by Lord Eldon, were far more than a match for the supporters of the impeachment. Resting his defence on the points of law, on the answers of the judges, Lord Eldon directed all his ability and

influence to repel the charges of personal corruption. He acknowledged that 'he would rather cut off his right arm than be guilty of such culpable negligence' and criminal indulgence to his Paymaster as Lord Melville had, and admitted that had the Commons thus confined their charges, he must have pronounced him guilty." Judgment was given upon the 12th of June 1806. The Lords took a vote over each of the ten articles. In the case of one (the 4th) there was a unanimous verdict of not guilty, and by very considerable majorities this was the verdict upon the remaining nine. Lord Melville's name was restored to the list of Privy Councillors, and he again took part in Parliamentary debates. In the course of one of these he is reported to have said "that Acts of Parliament were not to be literally and technically construed, but their sense or spirit collected from the temper of the times, the resolutions of the House of Parliament in which they originated, and the speeches and intentions of those who proposed them." With such views it was probably fortunate for the lieges that he did not pursue his profession to its natural termination.

The case of the *Duke of York and Mary Ann Clarke* reported by Mr. Browne opens up a long-forgotten scandal relating to the sale of army commissions, and throws a painful light upon the administration in a most important branch of the public service. Mrs. Clarke was the discarded mistress of the Duke of York, a prince who, although he was not distinguished as a commanding officer in the field, was held in rather high estimation at the Horse Guards. To Mrs. Clarke's fascinations he seems to have entirely submitted for a season, and that lady used her influence with him to her own advantage. Purchase in the army—at that time not a very ancient institution—was supposed to be sufficiently guarded against abuses. Rumours about the fraudulent sale of commissions had been rife for some time, and matters came to a crisis after Mrs. Clarke had been dismissed by the Duke, and had in revenge supplied information to a certain member of Parliament, Colonel Wardle, which led him in January 1809 to move in the House for a committee of inquiry. Mr. Browne gives the substance of the evidence led during twelve days. It proves conclusively the guilt of Mrs. Clarke. Officers impatient for promotion did not scruple to seek it through her influence, and by an illegal means of purchase. The Duke's guilt was not, however, proved, and the result of the inquiry was to acquit him, although his character, as the associate of such a woman, could not fail to suffer. He resigned at that time the office of Commander-in-Chief, but resumed it when his brother became Regent. In both Lord Melville's case and that of the Duke strong political feelings were excited by the inquiries.

The case of *Davison*, tried for frauds upon the Commissariat department, belongs to the same category. This man was a famous patron of fine arts, and entertainer of the great during the early years of the present century. His moral deficiencies had been,

however, sufficiently established by a conviction for bribery, which resulted in imprisonment for twelve months. "So lightly," says Mr. Browne, "was this offence then regarded, that as soon as Davison came out of prison, Lord Moira obtained permission of Mr. Pitt to be allowed to appoint him Commissary-General of the Forces, which he then commanded, and subsequently, with Lord Grenville's full consent, made him Treasurer of the Ordnance." This gave Mr. Davison favourable opportunities for handling large sums of Government money, which he sought to do with advantage to himself. When at last suspicions were aroused, and a committee on military expenditure set to work, they were able to report upon overcharges made by him to the extent of £90,000. Simple-minded Government was found to have been buying coals at some thirty per cent. over the real market price. Davison was tried before Lord Ellenborough on 7th December 1808, convicted, and sentenced to twenty-one months' imprisonment.

To some of the other proceedings related in these volumes we may perhaps have an opportunity of referring upon some future occasion.

CONDONATION.

THE judgment of the Second Division in the case of *Collins v. Collins and Eayres* (16th May 1882, 19 S. L. R. 506) seems authoritatively to decide what has always been a doubtful question in the consistorial law of Scotland. That condonation of adultery is an absolute bar to divorce, founded upon the acts of adultery condoned, has always been a clearly-recognised rule of our law. An act of adultery, once condoned, can never be made the substantive ground of a divorce. But attempts have sometimes been made to carry the doctrine of condonation further. It has been urged that an act of adultery once condoned is in the eye of the law not only "forgiven," but "forgotten;" that a condoned offence "is absolutely wiped out, and can never be subsequently referred to:" in other words, that the occurrence of the condoned act of adultery cannot be proved to any effect in an action at the instance of the condoner, not even as evidence in support of an allegation of renewed adulterous intercourse with the former paramour subsequent to the condonation.

The authority in support of this contention was certainly not very ample, but, in the absence of all authority to the contrary, it seems to have satisfied students of our consistorial law. Such, at all events, is the view taken by the only writer who of late years has written with authority upon the consistorial law of Scotland (Fraser on Husband and Wife, 1179). His statement of the law upon this point is as follows: "After the aggrieved spouse has

once forgiven the other's infidelity, it is incompetent to found upon misconduct prior to the reconciliation in case of any new adultery. In this respect the condonation is more complete than that applicable to cruelty where subsequent ill-treatment repeals the condonation, and allows a reference back to the earlier wrongs. This doctrine, that forgiveness sweeps away the offence, and that it can never afterwards be referred to in the event of subsequent adultery, is the rule of the Canon Law which the Scottish Courts gave effect to in the case of *Lockhart*. It is contrary to the law of England, at all events it was so when separation *a mensâ et thoro* was the only remedy for adultery. According to that law, condonation cannot be pleaded if there be subsequent adultery, or even different conjugal misconduct. The rule of the Canon Law, and that of the law of Scotland, is the simpler and the better. An offence like adultery once forgiven ought to be forgotten."

The authorities cited in support of this statement of the law are *Lockhart v. Lockhart* (M. App. *vide* Adultery, No. 1), Sanchez 10. 5. 9, and Carpzor, Juris Consistor. 2. 11. 197. Now, as was pointed out by Lord Young in delivering judgment in the present case, the case of *Lockhart*, which has been relied upon as a leading authority, is hardly an authority in point at all. It is true that the report of that case bears that the Court held "that reconciliation is a complete objection on both sides to proof of prior guilt then known to the parties." But what the Court really decided in the case of *Lockhart* was that a condoned act of adultery could not be pleaded or proved as a bar to a divorce founded upon acts of adultery committed by the condoning spouse.

There is one other authority upon the subject not referred to either in Mr. Fraser's work or in the judgment in *Collins'* case—that of Lord President Inglis, who in two recent cases in the First Division of the Court has had occasion incidentally to refer to the state of the law of Scotland upon this subject. In both these cases the views indicated by his Lordship coincide with those of Mr. Fraser and of the Lord Ordinary in the case of *Collins*.

These cases are *Watson v. Watson* (18th November 1874, 12 S. L. R. 78) and *Graham v. Graham* (19th July 1878, 5 R. 1093). In the case of *Watson*, which was a mixed case of cruelty and adultery, his Lordship is reported to have said, "There are acts of cruelty alleged both before and after the reconciliation, and there is no doubt that the acts of cruelty before may be proved. But it is the most difficult question whether the pursuer is entitled to prove the prior adultery. An action of separation on the ground of adultery is of recent introduction, and so it is not surprising that a question of the kind should not have occurred before. If the action was only founded on the ground of adultery, there would be a great deal to be said for applying to it the same rule as to a divorce."

It is obvious from this passage that in the opinion of his Lord-

ship it is incompetent in an action of divorce to prove adultery prior to condonation. In the case of *Graham*, which was an action of separation on the ground of cruelty, even more explicit language was employed. In delivering judgment in that case the Lord President was careful to distinguish between the effect of the condonation of adultery and that of cruelty. "I am not sure that 'condone' is a very happy expression to designate the forgiveness of cruelty, because it leads one to think of the kind of condonation applicable to divorce for adultery. When an act of adultery has been condoned, it is wiped out, and can never be referred to again, just as if it had never taken place; but it is not so in an action of separation on the ground of violence."

In neither of these cases, however, was it necessary to decide the point which was raised in the case of *Collins*, and the remarks of the Lord President are therefore merely *obiter*. None the less is it surprising that an opinion upon this somewhat novel point, clearly enunciated on two occasions by the head of the Court, was not cited or referred in the argument or the judgment in the case of *Collins*. Accordingly, the only authority presented to the Court in addition to that of *Lockhart*, which is scarcely in point, is that of the *canonists*. An attempt was made to throw doubt even upon this authority in respect it was suggested that expression of Sanchez, quoted by the Lord Ordinary, "*non potest amplius in iudicium deduci*," meant merely, "cannot be made the substantive ground of a judgment," and not, as was contended, "cannot be brought forward in a trial."

Such being the state of the authorities, the case may perhaps be regarded as one in which the Court was justified in disregarding authority, and in itself making the law by deciding the question upon broad grounds of justice and common sense. In this view there can, we think, be little doubt that the decision was one which will commend itself to the profession as just and reasonable. In deciding a question of such importance as the guilt or innocence of a spouse accused of adultery, the Court is entitled to have the whole facts of the case fully laid before it; but the effect of that theory of the law, unsuccessfully contended for in the case of *Collins*, would be to exclude altogether from the cognisance and consideration of the Court evidence of a material character. The occurrence of an act of adultery is proverbially difficult of proof; and hundreds of cases may be figured in which the proof of certain facts and circumstances which, taken by themselves, would go for absolutely nothing, would nevertheless be regarded as conclusive evidence of adultery on the proof to the satisfaction of the Court of the occurrence of previous acts of adultery between the same parties. A husband comes home unexpectedly and finds a stranger alone with his wife. No Court would hold that fact, if it stood alone, as relevant to infer adultery on the part of the wife; but as little would any Court hesitate to find the commission of adultery upon

this occasion as amply proved, were it clearly established that the same parties had on several previous occasions been guilty of adultery. Shall the husband, in such a case, be debarred from proving any previous act of adultery merely because he has had the generosity to condone the previous misconduct. Surely a spouse whose previous offences have been condoned ought not to be put in so exceptionably favourable a position in reference to the proof of alleged acts of adultery subsequent to the condonation. The lesson taught by such a law would be, "Never condone adultery; that serves merely to put the offenders upon their guard."

There is nothing in the view we here take inconsistent with the opinion of Mr. Fraser, to which we heartily subscribe, that "an offence like adultery once forgiven ought to be forgotten." Surely, and the same remark might be made with equal truth of every offence, but the maxim holds good only on condition that the offence is not repeated. To "forget" an offence in the moral and Christian sense is not to lose the recollection of it. Otherwise it would be absurd to associate the word "ought" with the word "forget;" for the word "ought" is applicable only to what is within the control of the will, and by no act of volition can the recollection of a fact be obliterated from the memory. Indirectly, no doubt, the will may control the recollection of trifling events. Once one ceases to dwell upon them in thought, they will probably very soon escape altogether from the recollection; but in the case of such an offence as the adultery of a spouse, no such result can possibly be obtained. Loss of all recollection of an act of adultery, even though the offence were forgiven, would argue such a failure to appreciate the heinousness of the offence as to amount to a perversion of the moral sense. To "forget" an offence is simply to cease to brood over it—to cease to cherish any resentment on account of it; and in this view, forgiveness in the higher sense comprehends the forgetting of the offence. More popularly, however, to "forgive" is to cease from any outward manifestations of resentment, either in word or deed; "to forget" is to banish all *feelings* of resentment *from the heart*.

An employer who has been defrauded by his clerk may take a merciful view of the case, and determine to give the offender another chance by retaining him in his service. Here, just as in the case of adultery, an offence "once forgiven ought to be forgotten." Has the employer sinned against this precept if, in the occurrence of the same offence a few months later, he remembers that it is the second time, and accordingly sends for a policeman. Surely no spouse, however desirous to let bygones be bygones, could, on discovering his wife in equivocal circumstances with another, possibly ignore the fact that a few weeks or months previously he had convicted his wife of adultery with the very person now detected in her company. It would be unreasonable surely in such circumstances to exclude from the view of the Court that evidence

which to the husband renders absolutely conclusive the proof of his wife's guilt.

The opinion indicated by the Court in the case of *Collins* is supported by the analogy of antenuptial incontinence. Such misconduct may be proved in an action of divorce; and from this it would seem to follow *à fortiori* that proof of adultery prior to condonation ought to be allowed, for this latter raises a much stronger presumption than the former, inasmuch as the offence is in the latter case committed in the face of the restraining influence of the marriage-bond.

This analogy, however, would seem to suggest one important limitation. Proof of antenuptial incontinence is limited to the case where the adultery founded upon was committed with the same person with whom connection was had prior to marriage. In like manner the proof of a condoned offence should be allowed only where that offence is alleged to have been committed with the same person in respect of adultery with whom the divorce is sought. Not only would evidence of acts of adultery with another be of less value, but its admission would be contrary to the general spirit of our law of evidence, which seeks to exclude so far as possible any wide or general inquiry into character and conduct. The spouse, too, who condones the offence of adultery thereby expresses confidence in the sincerity of the repentance and the strength of the renewed resolution; he habituates the character of the offender, and he cannot in subsequent proceedings be permitted to impugn that character in respect of those alleged offences in the face of which he has himself rehabilitated it.

NOTES IN THE INNER HOUSE.

In the case of *M'Kidd v. Manson* (May 18, 1882, First Division) a point of some importance to Sheriff-Court practitioners was decided. An action was raised in the Sheriff Court of Caithness; the summons being served on 22nd May 1880, no defences were lodged, and on 7th June 1881 a minute was presented for the purpose of having the action awakened. After intimation it was awakened. The defender then entered appearance, and pleaded an objection to the competency of this proceeding in respect that the case had never been called. In the inferior Court his objection seems to have been repelled, the Sheriff founding upon *Aitken v. Dick* (1 Macph. 1038). It was in that case held that an action began to be in dependence after the summons was executed. The defender appealed to the Court of Session, and was successful. The Lord President said: "The rule as to the effect of not calling a summons for a year and a day is, I think, perfectly fixed both in

this Court and in the Sheriff Court. It is not disputed that it is fixed in this Court, and has been so from an early period. The rule is that after a summons is served, if it is not called within year and day from the last diet of compareance, it is at an end. It has no longer any existence, and the pursuer must bring a new action. The presumption is that this rule being a rule of practice equally applicable to all Courts, it applies to the Sheriff Court as well as to the Supreme Court." He held that the 49th section of the Sheriff Court Act of 1876, pleaded by the respondent, applied "entirely to the mode of wakening causes and the period at which they may be wakened, and not to the question when an action comes into existence and becomes a living process capable of being wakened." The law, therefore, is now clearly established to be this—after a petition has been served it is in dependence, and continues to be so for a year and a day. If called during this period, it may be wakened at any time; but if not called, the sleep which commences at the completion of the year is the sleep of death.

A great deal has been said lately about the warrant against a debtor *in meditatione fugæ*. It is the intention of the Legislature, we understand, to preserve this peculiar process. In *Kidd v. Hyde* (May 19, 1882, Second Division) it has been decided that such a warrant is not a competent diligence after decree has been obtained. "It is plain," said Lord Rutherford Clark, "that the petition prays for a remedy which the Court could not grant; for under such a proceeding the debtor is not bound to find caution *judicatum solvi*. He can only be required to find caution *de judicio sisti*." It is clear from his opinion that he would have held the whole process abolished by the recent Debtors' Act were it not for the saving clause which it contains. It was argued in this case that under the 8th section of that Act the effect of a *meditatione fugæ* warrant now is that the creditor can compel his debtor to appear at a time fixed by the Court, and can then, instead of, as formerly, incarcerating him on refusal to pay, compel him to grant *cessio*. His Lordship points out that "a process of *cessio* at the instance of the creditor is the creature of the Act of 1880. But it can only proceed before the Sheriff of the county in which the debtor has his ordinary domicile. If the debtor has such a domicile, his apprehension is not necessary. If he has not, the process cannot proceed. In short, it is a process which is intended to be directed against Scotch debtors only against whom the Sheriff has jurisdiction *ratione domicilii*. Hence the present application can be in no sense available to the appellant."

The case of *Williamson v. Allan* (May 25, 1882, First Division) has an important bearing upon bankruptcy proceedings. It forcibly illustrates that a claim which might be set aside if presented for the purposes of voting at the election of a trustee, may after all be a good and valid one, which the trustee is bound to admit. In 1876 a father had advanced to his son a large sum of money to

enable him to stock a farm. In 1879 the son's affairs became involved; and acting upon the advice of an agent, he granted an I O U to his father for the sum advanced, antedating it to the date at which the advance was actually made. Before the trustee, and afterwards before the Court, upon appeal it was maintained by a creditor that this sum must be viewed as a gift, and that his father had no valid document of debt because the I O U bore a false date, and had actually been granted on the eve of bankruptcy. The Court sustained the father's claim nevertheless. The Court were satisfied in point of fact that an advance had actually been made, and of such an amount as to exclude the probability of its being intended as a gift. The Lord President in the course of his remarks said: "The question then arises, May this writ be challenged and set aside as a fraud at common law? It appears to me that it cannot, unless we are satisfied that it was granted in order to deceive, or for the purpose of creating an undue preference. If the money was really due, surely it was not an illegal thing to grant an acknowledgment of it, even though the party so granting knew himself to be insolvent." As to the date, he said: "It was a great pity that the I O U instead of being antedated had not borne the date at which it was really granted; it would have been much better if it had been so, but the mere fact of antedating does not appear to me to be sufficient upon which to base a charge of fraud, nor does it preclude us from looking at the document." Lord Shand, referring to the case of *Haldane v. Speirs*, remarked that the decision in that case was given "by the barest possible majority; and should the point then determined arise again for consideration, it is not impossible that the decision might be reversed."

In *Morrison v. Crear* (June 2, 1882, First Division) the Court have decided that it is not, in ordinary circumstances, competent to sue for an account prior to the expiry of the period of credit allowed to the defender. The Sheriff-Substitute before whom this case originally came in the Sheriff Court of Ross dismissed it as premature, finding the pursuer liable in expenses. The Sheriff, however, held that decree in the action only required to be qualified by superseding extract. In the Court of Session the view taken by the Sheriff-Substitute was adopted. The Lord President said: "It seems to be thought by the Sheriff that the raising of an action for a debt before the term of payment has arisen may be defended upon the principle that judgment may be deferred till after the period of credit has expired. With that view I do not agree. It seems to me that when a party raises an action for the payment of an account before the debt is due, the action is premature, and falls to be dismissed. Any other rule would be most dangerous. . . . If an action were raised before the debt was due with the allegation that the debtor was *vergens ad inopiam*, and diligence was done on the dependence, that might be sustained. But nothing short of that would justify a premature demand." Lord Shand thought that

if the prayer for decree had been qualified by the insertion of such words as "the date being first come and bygone," the action would have been competent.

The case of *Todd v. Armour* (June 8, 1882, Second Division) raises a curious question. It was an action to recover a horse stolen in Ireland, afterwards sold in open market in that country, and finally again sold after a public manner in Scotland, when it was bought by the defender. Sale in open market does not protect by our law the purchaser when a previous theft of the subject sold can be proved. But it does avail him by the law of Ireland. The Court held that the sale in Ireland protected the Scottish purchaser. The judges indulged in speculation as to the law which would have applied had there been no sale in Ireland, and they differed. The Lord Justice-Clerk and Lord Craighill seemed both to hold that the law of Scotland would govern the case. "I should not be disposed," said the former, "to say that mere purchase in open market in Scotland would validate the sale when the horse had been stolen in another country." Lord Craighill argued, if nothing had followed on the theft of the horse but the sale of it in Scotland, by what can it be said that the *vitium* consequent on the theft was purged? Surely not by the sale in Scotland, by the law of which country no such result can happen. If there is a *vitium reale* by the law of Scotland, a sale in open market has no effect in destroying the right of the real owner. Lord Young, on the other hand, took the somewhat curious view that the right to recover stolen property sold in a Scottish market depends upon the *lex domicilii* of the party claiming it. A Scotchman could recover it, because his national law recognises the *vitium reale*; an Irishman could not, because the law of Ireland gives a purging efficacy to the transactions of the market-place. "I am not disposed," remarks his Lordship, "to entertain an action by an Irishman who comes to a Scottish purchaser at Falkirk Tryst and says, 'True, there would have been no answer to a sale in open market in my country, but your law is different, as a *vitium reale* attaches, and so I can get my horse back although it was sold in open market here.' That is a proceeding which is not to be heard of; it is opposed to every consideration of equity. . . . I am not prepared to extend the Scottish *vitium reale* to foreign thefts."

It is decided by *Hare v. Stein* (June 8, 1882, First Division) that when a pursuer simply declines to insist further in an action, and the defender is accordingly assoilzied, this is not equivalent to an abandonment under the Judicature Act. The defender is not entitled to insist upon payment of full expenses, and the judge may competently modify them. Lord Shand went the length of saying "that there are circumstances in which, even under the statute, the Lord Ordinary might, for the purpose of avoiding further outlay, fix the amount of expense to be paid by the party abandoning."

Although not decisions in the Inner House, two judgments of

Lord Fraser relating to subjects upon which he has long been an authority may be here referred to. In *Duncan v. Duncan* (May 25, 1882) he has held that a parent seeking aliment from a child is not bound to call all the members of the family, the obligation being one which the children are jointly and severally liable to perform. "A father," he says, "seeking aliment from his children, or from his daughters' husbands, is a person presumably in very reduced circumstances, and therefore incapable of furnishing the means of litigation. If he were obliged to call all his descendants, and the husbands of female descendants, he would possibly find them scattered in different counties in Scotland, and therefore his action could only be competent in the Supreme Court. This would be a hardship in itself. In the next place, the defence by each child to a claim by a father might be of the most varied description, involving troublesome and expensive inquiries. Then before liability could be enforced, the unfortunate father would have to go through half-a-dozen different litigations, and in all probability before the litigations were ended the dispute would take end by his death."

In *Malloch v. Duffy* (June 2, 1882) Lord Fraser decided that a master is justified in dismissing an apprentice who solicits business from his customers. The Lord Ordinary was of opinion that even to systematically engage in the same trade as his master carried on was a breach of the apprentice's obligation under his indenture.

In *Fisher, Renwick & Co.* (June 13, 1882, First Division) the Court have decided that when a party is forced to supply himself with goods in consequence of a breach of contract, it does not lie with him to prove that he has done so as cheaply as possible, but upon the party in breach to prove the opposite.

SUNDAY LAWS—WORKS OF NECESSITY.¹

THE judges of the Common Pleas Division have just decided in *Regina v. Taylor* that it is unlawful for an ordinary barber to shave his customers upon Sunday; and this on the ground that he is a workman within the meaning of the Lord's Day Act (R. S. O. chap. 189, sec. 1), and the shaving is a worldly labour or work done by him in the course of his ordinary calling as a barber, and is not a work of necessity or charity. Their Lordships were not prepared to say that a barber connected with an hotel would not be permitted to shave on the sacred day; for in such a case he might be looked upon as a servant kept in a private family to do work on Sundays as well as other days. The Court considered the Scottish case of *Phillips v. Innes* (4 C. and F. 234), decided in 1837, and in

¹ *Vide Journal of Jurisprudence*, vol. xx. p. 67.

which the House of Lords declared shaving on Sunday by a barber not a work of necessity or mercy, a binding decision.

The subject is not only an important, but also an interesting one. It has been considered by several Courts on the other side of the line. In *Commonwealth v. Jacobus* (1 Penn. Leg. Gaz. Rep. 491) it was held that the business of a barber in shaving his customers on Sunday morning is "worldly employment," not "a work of necessity or charity." The Court said, "It is argued that as the law does not forbid a person to wash and shave himself on Sunday, and thus to prepare himself to attend public worship, or otherwise properly to enjoy the rest and recuperation which it was the purpose of the day to give, therefore another may do it for him without incurring the condemnation of the law. This view is not sustained by the authorities. . . . It is further contended by the counsel for the defendant that long-continued usage and customs of society prove that the business of a barber is by common consent considered a necessity within the meaning of the law. . . . But is it a work of necessity? Many persons shave themselves on that day who are shaved by a barber on other days of the week, and not one in ten who shave on that day employ the services of a barber." In this case Jacobus shut up his "tonsorial parlour" at ten o'clock on Sunday morning; the Court thought that made no difference, and added, "if the closing of these shops on Sundays is an inconvenience to the public, the remedy rests with the Legislature and not with the Court."

Lord Brougham, by the way, in *Phillips v. Innes*, seemed to think that the shaving might be done in Dundee on Saturday, as the Glasgow people did it then. The Magistrates of Dundee had held that shaving on the Sabbath was right, although it was "not lawful for the barber to work in the making of wigs on Sunday."

In another case in Pennsylvania it was held to be illegal for a barber to shave on Sunday even those who were sick on Saturday and could not come on that day to be cleansed; and the fact that he did not charge for his labour is considered no excuse (*Commonwealth v. Williams*, Pearson's Decisions, p. 61). Even so late as the middle of the eighteenth century "ministers were sometimes libelled" in Scotland "for shaving" themselves on the Lord's Day (Buckle, vol. iii. chap. iv. note 183).

On the other hand, a barber at Tunbridge Wells was summoned for infringing the Act of Charles II., and he ingeniously pleaded that if any of his customers had no money they were shaved for nothing, thus making "the operation a work of charity;" and further, that if a footman or waiter were not shaved on Sundays he would probably be discharged, and to serve him was therefore "a necessity." This satisfied the magistrate, and the summons was destroyed (*The Graphic*, Nov. 27, 1879).

And in Tennessee, a couple of years ago, it was held that keeping open a barber's shop on Sunday is not indictable either as a mis-

demeanour or a nuisance. It was held not to be a misdemeanour, because a penalty for the violation of the Sunday laws is imposed. The question then was, whether it was a nuisance, and the Court said, "It cannot be said that a barber's shop is something which incommodes or annoys, or which produces inconvenience or damage to others. On the contrary, the business of barbering is so essential to the comfort and convenience of the inhabitants of a town or city, that it may be regarded as a necessary occupation. To hold that it becomes a nuisance when carried on on Sunday, is a perversion of the term 'nuisance.' All that can be said of it is, that when prosecuted on Sunday it is a violation of the statute, and subject to be proceeded against as prescribed by law, but not subject to be indicted as a nuisance. It may shock the moral sense of a portion of the community to see the barber carrying on his business with open doors on Sunday, but it produces no inconvenience or damage to others, and therefore cannot be regarded in legal contemplation 'a nuisance'" (*State v. Lorry*, 7 Baxt. 95).

It appears that every State in the Union, except Louisiana, has a Sunday law; the original and model of most of them is the English statute of 1676, passed when Charles II. was king. The laws differ greatly, therefore do the decisions; but the general principle of all is the same; ordinary business and labour is forbidden, except works of necessity and charity. In some of the statutes the laws contain special provisions against what we may assume to be the besetting sins of the inhabitants. The Arkansas statute punishes Sunday indulgence in bragg, bluff, poker, seven-up, three-up, twenty-one, thirteen cards, the odd-trick, forty-five, whist, or any other game at cards, by a fine of from \$25 to \$50. California charges from \$50 to \$500 (in the shape of a fine) for attending any bull, bear, cock, or prize fight, horse-race or circus, or for keeping open any gambling-house, or any place of barbarous or noisy amusement, or any theatre where liquor is sold on the Lord's Day. In ages gone by in England bull-baiting or bear-baiting used to cost 3s. 4d., and wrestling and bowling 5s. upon Sunday (1 Car. I.). The Florida law enacts that any one disturbing a congregation of whites is subject to a penalty of not more than \$100; or the offender may be whipped, the stripes not to exceed the orthodox forty save one, or be imprisoned for not more than six months.

South Carolina alone sticks to the old notion of compelling people to go to church. Her statute provides "that all persons having no reasonable or lawful excuse, on every Lord's Day shall resort to some meeting or assembly of religious worship tolerated and allowed by the laws of the State, and shall there abide orderly and soberly during the time of prayer and preaching, on pain of forfeiture, for every neglect of the same, of the sum of \$1."

In the original Sunday Go-to-Meeting Act, that of Elizabeth,

every person had to repair to his parish church every Sunday, on pain of forfeiting one shilling for each offence; and any one over sixteen who absented himself for a month, forfeited £20 a month (Eliz. c. 2; 23 Eliz. c. 1).

In Indiana the Act forbidding working, etc., on the day of rest applies only to those over fourteen years of age.

"Necessity" is a relative term, and the law does not mean that the work to be allowed must be "absolutely necessary." "If nothing but absolute necessity were intended, it would, in general, be unlawful to prepare a meal on the Sabbath, because it might without difficulty be previously prepared, or most people might safely enough fast for twenty-four hours. To supply gaslight would be equally unlawful, for people might use candles previously provided, or might retire to bed at twilight."

The great object of all these laws is to make the day a day of rest; but some things are more important and necessary than even *rest*, and the doing of such things when indispensable is allowed. So it was held that the seasonable preparation of breakfast for her employer's family was such a work of necessity as justified a maid-servant in travelling on Sunday morning (*Crossman v. Lyon*, 121 Mass. 301); and a servant-man may drive his master's household to church in his master's carriage (*Com. v. Nesbit*, 24 Penn. St. 398). In fact "the law has never been regarded as applying to the proper internal economy of the family. It does not except the ordinary employment of making fires and beds, cleaning up chambers and fireplaces, washing dishes, feeding cattle, and harnessing horses for going to church, because these were never regarded as the worldly business of the family, and therefore not forbidden to the head of the family, or to any of the domestics."

In Pennsylvania it was held unlawful to run street cars on Sunday (*Com. v. Jeandell*, 2 Gr. Pa. Cas. 506), or an omnibus (*Com. v. Johnston*, 22 Pa. St. 102), even if the omnibus is used partly by church-goers it will not help the case. Still, "if an invalid, or a person immersed for six days within the close walls of a city, requires a ride into the country as a means of recuperation, which is the true idea of rest, there is nothing in the Act of 1794 to forbid the employment of a driver, horses, and carriages on Sunday to accomplish it. Equally lawful is the employment of the same means to go to the church of one's choice, or to visit the grave of the loved and lost to pay the tribute of a tear" (*Com. v. Johnston, sup.*). In Georgia, however, it was recently decided that the running of street cars in cities and their vicinity is a work of necessity (*Angusta and S. R. R. v. Renz*, 55 Ga. 126).

Apropos of the labour of domestic servants. A doctor's boy, having declined to wash his master's gig on Sunday, had the pleasure of drawing forth from the judge of the Aberdeen and Kincardine Small Debt Court the following remarks: "It is essential to bear in mind that in determining what is a work of necessity in a

work of necessity on Sunday where the sap is flowing freely and all the troughs are full; the maple-sugar man having no way of saving his harvest save by emptying the troughs that are full (*Morris v. State*, 31 Ind. 189; *Whitcomb v. Gilman*, 35 Vt. 297).

Again in liberal Indiana, the brewer is allowed to turn or handle the barley which he is manufacturing into malt for his beer, as twenty-four hours' neglect would make it unfit for use. The turning is a work necessary to accomplish the object which the brewer has in view, and as the law authorizes the manufacture of beer, the labour necessary to make it is lawful and a work allowable on Sunday (*Crockett v. State*, 33 Ind. 416).

In Ohio it was held that under special circumstances a miller might grind on that day. The judge said he thought it would hardly be questioned that a gas company might supply gas, a water company water, and a dairyman milk to their customers on that day; for it is no part of the design of the law to destroy or impose ruinous restrictions upon any lawful trade or business (*McGatrick v. Wason*, 4 Oh. St. 566).

Again in Indiana an innkeeper sold cigars from a stand which was a part of his establishment, and the Court held that he was not punishable. The judge said, "There is a daily necessity for putting a house in order, cooking meals, drinking coffee or tea, smoking a cigar by those who have acquired the habit, or continuing any lawful habit on Sunday, the same as there is on a work-day, and whatever is necessary and proper to do on Sunday to supply this constant daily need is a work of necessity within the meaning of the law. It is not unlawful to keep a hotel on Sunday in the same way that it is usually kept on a week-day, and if a hotel keeps a cigar-stand, which is a part of its establishment, from which it sells cigars to its guests, boarders, and customers on a week-day, to sell cigars from the same stand in the same way on Sunday is not unlawful. There is no difference legally between the act of selling a cigar under such circumstances and the act of furnishing a cup of tea or coffee, a meal of victuals, or supplying any other daily want to a customer on Sunday for pay" (*Carver v. State*, 69 Ind. 61). Smokers, therefore, cannot complain.

In Alabama, as in Ontario, all shooting is forbidden if it is not justified by necessity, and shooting a dog in mere mischief is not a necessity (*Smith v. State*, 50 Ala. 159). In Missouri, however, a man went out hunting on Sunday. He was prosecuted, but acquitted, as the law only forbade working on the Sabbath-day; the district attorney argued that "hunting" was "working," but the judges could not see it in that light (*State v. Carpenter*, 62 Mo. 594).

In Massachusetts it has been held that cleaning out a wheel-pit on Sunday, to prevent the stoppage of mills employing many hands, is not a work of necessity within the meaning of the law. Nor can one who helped at this work as a matter of kindness protect

himself by claiming that what he did was a work of charity (*McGrath v. Merwin*, 112 Mass. 467). No wonder, when the law is such, that the poet wrote—

“Alas for the rarity of Christian charity under the sun!”

The consideration of works of charity must be deferred until some future time.

[See also, on above subject, *Seaman v. The Commonwealth*, 21 Am. Law Reg. N. S. 256.—Ed. C. L. J.]—*Canada Law Journal*.

Reviews.

A Concise Practical Treatise on the Law of Property. By H. W. BOYD MACKAY, Esq., LL.B. London: H. Sweet. 1882.

THIS is another good book gone wrong. It is the result of much diligent labour among the sources of English law, yet it scarcely bears out its title. It is not concise, for it extends to about 800 pages. It is not practical, for no practical man would go to its pages for an adequate account of any one of the many subjects it touches without exhausting. It is not a treatise in the only intelligible sense of the word, since it treats nothing in such a way as to leave clear what was obscure before. It deals with law—and so far the title is justified—but not with the law of property, taking the word in any reasonable construction. Were it not that the author was already a laureate in law in 1863, and a law-writer in 1870, we should have said that this work was such a book as might have been compiled by a clever student who had made up his mind to distinguish himself early in his professional career by throwing into book form the notes which a diligent study of the books set for an entrance examination had thrown in his way. Yet we should not recommend the result to other students; for the form of compressed notanda, however useful for the compiler himself as *memoranda itineris peracti*, is too bald to attract a beginner, or, to change the metaphor, too strong food for the digestion of babes.

It may be necessary to substantiate this grumble. So be it. Easements and other incorporeal real rights are disposed of in about ten pages; prescription in less than six; mines in a clause; the Lands Clauses Acts in a sentence, a clause, and a footnote; enclosures are not mentioned at all; nor is the Land Tax; nor are boundaries, except in a controversial reprinted article contained in the appendix. On the other hand, the work deals with both real property and chattels; succession; transmission by death and marriage; contract in all its relations; the rule in *Shelley's* case; the doctrine of *Cy près*; perpetuities, conditions, and a mass of matter under the head of priorities, which reminds one of the unscientific method of G. J. Bell in his Commentaries. Who, it

We have endeavoured to lay before our readers a general account of the scope and plan of this work. Of the care and industry which characterize it there can be no doubt; of its scientific value and accuracy of teaching it does not become a non-medical reviewer to speak, but judging from the opportunities which the author must have had of studying his subject, and the concise and clear manner in which he can convey his information, we should think that this work will be a standard authority on Forensic Medicine for a long time. It may seem odd to employ the term "concise" to a book of this size, and which confessedly is only an instalment of a larger work, but it is none the less true that the facts given in the text are stated with remarkable brevity, and though in a book of the kind there must be a certain amount of repetition, it would be difficult to select any point which is unnecessarily alluded to.

Curiosities of Law and Lawyers. By CROAKE JAMES. London: Sampson Low, Marston, Searle, & Rivington. 1882.

MR. JAMES tells us in his preface that on retiring after fifty years' practice his friends insisted on his writing and publishing this collection of anecdotes and curiosities connected with the law. His reading has evidently been extensive, and he has succeeded in making a very large collection of extracts from various sources. Of course these are of all sorts—some poor and dull, as many bright stories are apt to become when transferred to paper; some fair; and some which still preserve their point and sparkle. Some can hardly come under the heads either of anecdotes or curiosities, but are mere statements of law, interesting enough no doubt to a lawyer, but not particularly curious. As we believe, however, that this book has a transatlantic origin, we must keep in view that what appears commonplace to us may have a very different appearance to our "cousins-in-law" across the water. On the whole, we may congratulate the author on having made a very judicious and amusing collection. It is a book which will, we doubt not, often serve to pass away an idle half-hour in the ensuing vacation, when the rain is pouring in torrents, as it seems at present determined to do. If it does not, so much the better: the volume can then be taken out and enjoyed with a cigar under a tree, or in a hammock, or on board a yacht, or anywhere where life is most delightful and the mind is in a state to be gently amused. Of course we meet with many old friends in these pages. Campbell's "Lives of the Chancellors" has, as may be imagined, been laid pretty freely under requisition; for Scotch stories Cockburn's Memorials appear to have been the book most used. As in a volume like the present a few examples are worth any amount of criticism, we will give one or two extracts taken at random:—

"Scarlett, in a breach of promise case (*Foot v. Green*) was for

the defendant, who was supposed to have been cajoled into the engagement by the plaintiff's mother, afterwards the Countess of Harrington. The mother as a witness completely baffled Scarlett, who on behalf of the defendant cross-examined her; but by one of his happiest strokes of advocacy he turned his failure into a success, "You saw, gentlemen of the jury, that I was but a child in her hands. *What must my client have been?*"

We do not recollect to have met with the following:—

"A Scotch counsel named Rae was one day arguing a case with much extravagant drollery, Mr. Swinton said of him, 'He has been to-day not only Rae, but *outré*.'"

"Lord Wellesley's aide-de-camp, Keppel, wrote a book of travels and called it his *Personal Narrative*. Lord Wellesley was quizzing it, and said to Lord Plunket—

"'Personal narrative—what is a personal narrative, Lord Plunket? What should you say a personal narrative meant?'

"Plunket answered, 'My Lord, you know we lawyers always understand *personal* as contradistinguished from *real*.'"

Handy Book of Reference to Decisions in the Court of Session, Court of Justiciary, and House of Lords from 20th June 1877 to 27th August 1881. By THOMAS SINCLAIR, Member of the Faculty of Procurators in Glasgow. Holmes: Glasgow. 1882.

THIS is an attempt to supply a ready means of reference to all the reported cases from the period to which the last volume of the Digest came down up to the present time. The references are given under the heading of the subjects to which the different cases relate, but neither the names of the cases nor the dates are given. It is, we think, unfortunate that the names have been omitted, but the size of the book would of course have been very much increased. The references are on the whole well arranged, though sometimes it is rather difficult to see why a certain subordinate feature in the case has been chosen to indicate its nature. Thus one would hardly look under the head of "Burgh, exclusive trading in," for the procedure to be taken for authority to apply the funds of an incorporation nearly extinct to other than their original purposes. Under the same case we find the Act 44 Vict. c. 6, referred to as relating to it. The Act in question is the Local Taxation Returns (Scotland) Act, 1881, and we are at a loss to know what connection it has with the matter in point.

This little book may prove of some use, but in another edition we hope to see it improved.

The Month.

Flogging as Punishment of Juvenile Offenders, England.—The reports containing the opinions of magistrates and officials of England form the first portion of this blue-book, and amount to 181 folio pages. The reports from Scotland come next, with only 51 folio pages. We recently gave an abstract of the opinions of the Sheriffs-Principal and resident, as also those of justices and magistrates in Scotland, on the question of switching, birching, or flogging as a proper and expedient punishment on juvenile offenders (May number, p. 264). We now give a similar outline of the opinions by the magistracy of England.

The *general* opinion is adverse to imprisonment and in favour of whipping for juvenile offenders, but much diversity is expressed as to the proper age of the boy on whom this punishment is to be inflicted. The majority of magistrates desire that the age should be extended to sixteen, and that the offences should embrace all crimes and offences except the higher. There is a difference of opinion as to the proper instrument of punishment, whether it ought to be a cane, a rod, or a switch; also as to the number of strokes, varying in opinion from six to twenty; whether it is to be inflicted privately or more publicly, also as to the place of infliction; whether a prison, a police office, or the Court-house, or in school, and who should be the official executor; and whether by, or merely in presence of, the parents; and whether it be compulsory to require the presence of a surgeon during the infliction. In all these points there exists the most diversified and often directly opposing opinions. The opinions embrace those of the Chairmen of Quarter-Sessions, Recorders, Magistrates of Metropolitan Police Courts, Stipendiary Magistrates, and Burgh Magistrates throughout England. The great majority of the magistracy are of opinion that the parents or guardians of juvenile offenders should be punished vicariously for the offences of their children, and that either by fine, recoverable by distress, or enforced by imprisonment or by recognisance or surety for the good behaviour of their children. This by many is limited to instances where the parents have in some way or other been accessory to the offence. To make it more extensive would be the reverse of the Scripture precept of visiting the sins of the fathers on their children, but punishing the parents for the offences of their offspring. All agree on the great advantages of industrial schools and reformatories.

We select some of the most important and striking opinions of the English magistracy illustrative of general suggestions.

The Quarter-Sessions of Anglesey observe "that as in many cases parental neglect or misconduct conduces to the offence, the Court should have the power to proceed against the person who causes the offence, as well as against the juvenile offender; and further, as many offences are committed by juveniles through want, arising from

parental neglect, the Court should have power to proceed against either or both parents for gross neglect of family, whether or not the defendants may have become chargeable to the parish" (p. 3).

The Quarter-Sessions of Bedfordshire passed a resolution "that no measure for the prevention of juvenile crime, and consequently obviating the need for punishing young children, would be more efficacious than that of making parents or guardians pecuniarily responsible to the fullest possible extent for the misconduct of children under fourteen years" (p. 6).

The Quarter-Sessions of the county of Chester recommend "that power be given to magistrates to commit a child or young person to *solitary* confinement in a cell of the police station for a period not exceeding twenty-four hours for a child under twelve, and not exceeding forty-eight hours for a young person between twelve and sixteen" (p. 11).

The Quarter-Sessions of Cornwall recommend "that power be given to Courts of summary jurisdiction to inflict on the parent or guardian of any child or young person convicted by such Court, either in *addition* to or *instead* of any punishment inflicted on such child, a fine not exceeding that to which such child or young person has become liable, in any case in which such Court is satisfied that such parent or guardian has, by neglecting to take proper care of such child or young person, or otherwise conducted to such misconduct" (p. 11).

The Quarter-Sessions of Essex remark, "The children that go to prison because their parents or friends will not pay the fine, are, it is believed, the children that are already contaminated by the incidents of their daily lives, for no matter how poor the parent may be he will manage to find money to pay the fine if the boy is a good boy; if the boy is a troublesome one he may think that a little imprisonment may be an advantage to him, and he will not think much of the stigma that may attach to the boy." They recommend "(1) whipping for all juvenile offences except homicide; (2) to require the fine to be paid by the parent; (3) to bind over the parent, whether he consent or not, for the good behaviour of the child; (4) to order the juvenile offender to be locked up in a police cell for not more than three days; (5) to order the juvenile offender to be confined in a State school for a short period (say not more than three months)"! The justices make the following remarkable observation: "With regard to whipping, your committee would observe that whilst *six* strokes of the pattern birch-rod for a boy under twelve, and *twelve* for a boy under fifteen, may be a fit punishment for a naughty boy, yet whipping is objected to by many as a degrading punishment, and also on account of the inequality of its effects on differently constituted boys, inasmuch as to a sensitive, delicate boy a whipping might be absolute torture, whilst to a bold, healthy, strong boy it might be no punishment at all, as on such a boy the effect would be probably ephemeral, the boy could be little hurt,

and although he might complain bitterly, yet when the policeman's back should be turned he would probably laugh, his companions certainly would not think the worse of him for being whipped, and might make a hero of him. And it is a question whether a whipping is so good a punishment for reclaiming a bad boy as a short period of imprisonment, in which case he finds himself alone in a cell, is miserable, cries himself to sleep, and resolves never to do anything to again bring himself into prison (and statistics show that nine out of ten keep this resolution). Moreover, it must be borne in mind that girls cannot be whipped, and *that a girl is often as bad or worse than a boy* !

The Chairman of the Quarter-Sessions of Herefordshire writes: "I am no advocate for the imprisonment of young children; indeed, when a Police Magistrate I resorted to the device of causing the parents of children summoned before me to be sent for, and induced themselves, in the presence of the gaoler, to inflict the castigation which appeared to me to be the right punishment for the offence, *in order to avoid inflicting it* [?]. But I cannot but fear that if the power to imprison young children were in all cases absolutely taken away from the judicial authority, certain classes of young children, especially females, might cease to be punishable at all and become an *intolerable nuisance*" (p. 23).

The Quarter-Sessions of Lindsey district of Lincolnshire remark "that although there are doubtless many cases where children have been used to such rough treatment at home that flogging would do little or no good, yet we consider there would be far less reason to resort to imprisonment than at present if the power of ordering corporal punishment by whipping with a birch-rod were extended to all male children" (p. 31).

The Quarter-Sessions of Middlesex observe, "A whipping may be a very suitable punishment for the first or second offence of a mischievous boy, but would be an act of cruelty if inflicted for an act of vagrancy or even theft upon a half-starved lad turned out of doors by a drunken parent" (p. 34).

The Justices of Pembrokeshire observe, "It is sometimes contended that the punishment of whipping is itself brutalizing and otherwise undesirable, and that leaves the case of female offenders unprovided for; and, moreover, that if an offender is reconvicted some graver penalty is necessarily required. But we believe that experience has shown this mode of punishment to have a more deterrent effect on young persons than any other, and we do not share the objection to its infliction" (p. 41).

The Justices of Oxfordshire place themselves in a very peculiar position by refusing to express *any* opinion or make any suggestions on the subject submitted to them by the Secretary of State. They made and reported the following unanimous resolution, prefacing with the remark "that it never had been the custom of the Oxfordshire Quarter-Sessions to discuss *abstract* questions relating to the

amendment of the law:" "That, having regard to the existing state of the law, and the expressed opinion and recorded action of the Secretary of State in respect of the imprisonment of children and juvenile offenders, Justices are placed in a position of considerable difficulty in the execution of their duties: Resolved, that, in the opinion of this Court, it is not desirable that there should exist an apparent conflict in the administration of the law between the Secretary of State and the Justices, and that it might relieve the Justices of the difficulty which they experience, and might tend to a more consistent administration of the law, if the Secretary of State should be pleased to issue for the guidance of the Justices a distinct recommendation as to the course which, in his opinion, it is expedient for them to adopt in the punishment of children and juvenile offenders." To this very blunt response the Secretary of State replied in a lengthy letter, stating the cause and object of his circular, and concluding: "The Secretary of State cannot concur in the opinion that these are in any sense *abstract questions*. On the contrary, they appear to be very *practical* matters, which intimately concern the administration of the law with reference to that part of the community on whom the future welfare of society depends. They are questions which must necessarily present themselves in a practical form to those who are called to administer the law, and whose views must therefore have the greatest weight upon those who are responsible for the supervision and amendment of the law. The Secretary of State has thankfully to acknowledge the cordial assistance which he has received from the Magistrates throughout the country, in the shape of many valuable and practical suggestions as to the best methods by which the defects in the present law might be remedied, and he would have been glad if the Justices of Oxfordshire found themselves able to contribute something to an end in which the whole community is deeply concerned" (p. 43).

The Justices of Shropshire remark that "all punishments, whether whipping or imprisonment or any other, lose their deterrent and curative effect by frequent repetition, therefore a variety of punishment should be provided, increasing probably in severity on repetition of breaches of the law" (p. 45).

The Justices of Ipswich (county of Suffolk) are "in favour of whipping juvenile offenders, such punishment to be inflicted by an official and *not* by the parent" (p. 47). But the Justices of St. Edmunds (in the same county) recommend "that when the child or juvenile offender is a pupil in any school, the Justices may authorize and direct the *master of such school*, with the consent of the parent or guardian of such child, to impose on the offender some punishment ordinarily inflicted for breaches of school rules or discipline" (p. 48).

The Justices of Warwickshire recommend that "offenders under the age of twelve should be punished by being *privately* whipped,

and with not more than six strokes of a birch-rod, and if above that age with not more than *twelve* strokes by a constable, in presence of an inspector or other officer of police of higher rank than a constable, and also in the presence, if he desires to be present, of the parent or guardian of the offender" (p. 52).

The Rev. T. Powell, the oldest magistrate in Hertfordshire, makes the following observations: "Juvenile offences spring from three sources: (1) An innate mischievous disposition; (2) the evil example or encouragement of bad parents; (3) a love of or a necessity for peculation. If these be the sources of the disease, the remedy consists in their *extermination*. The first is rapidly being got rid of by the action of elementary education and Sunday schools. In ten years from to-day the doings of the boys of the lower orders from mischievous dispositions will give justice little trouble. As to the second, the law must deal with the parents or legal guardians. If it can be proved that such parent or person responsible knew of, partook of, did not declare such offence, did not insist on the juvenile regularly attending school, or by any evident connivance became even part of such offence, lay the penalty of the offence on the responsible head. As regards the third, the same action which is removing No. 1 is at work on the "love of peculation." As to the necessity of peculation, when every juvenile is thrifty enough and proud enough to bank his penny a week, he will be too thrifty and too proud to be a juvenile offender. In the meantime, if little John Smith is guilty of any juvenile offence, such to be by a short Act interpreted, and by a Justice convicted, let him at once be taken to the nearest elementary school, and there be flogged after the Eton system; *if a girl, then let the mistress birch, the parent or guardian to pay 2s. 6d. for the operation; there really need be no other cost*"! (p. 61.)

The Recorder of Colchester (J. J. Johnston, Q.C.) observes as to the three alternative punishments, fine, imprisonment, and flogging: "The third, which was advocated by the present Home Secretary, whom he had the pleasure of knowing very well—that, it might be said, was a very economical process, but the question was whether it was efficient? And as to that he certainly had his doubts—the result of experience and observation. He remembered when a scholar at a public school that the boy who was once flogged was constantly being flogged afterwards. The mere pain was nothing, it was the degradation, and having got over that the boy did not care. Flogging as a deterrent did not go far, and of that he was further convinced by his experience at the Westhampnett Workhouse, of the Board of Guardians of which he was vice-chairman, and where the rod had been applied pretty vigorously for petty offences. At the same time he would advocate an enlarged discretionary power of inflicting corporal chastisement, extending it to petty offences. The more boys were flogged, the more callous they became. It might be said that garrote robberies in London were

put down by the use of the cat; but that punishment was very severe, and its severity would make our humanity revolt if it were inflicted upon children. Besides, it might have some effect upon an adult who comprehended the consequence of his acts, but it was very different in the case of a thoughtless child, and he doubted whether it would have any deterrent effect" (p. 67).

The Recorder of Wells (J. E. Rogers) says, "I am no friend of whipping as a general rule, in substitution of other punishment, although I think it might most properly be added to the sentence where the parent has to pay the fine. One objection to whipping as a *sole* punishment is that the degree or amount of the punishment must necessarily be so unequal and uncertain—depending so much, as (in the absence of any known mechanical appliance) it must depend, upon the will, skill, and nerve of the operator" (p. 82).

Mr. Ingham, of the Bow Street Police Court, says that "flogging ought not to be inflicted on more than two occasions" (p. 86).

Mr. Hannay, of Worship Street Police Court, says, "The punishment of whipping is unequal in its operation, and being applied both to serious felonies and trifling misdemeanours, it makes the punishment for these offences alike in kind, and is not sufficiently elastic to make different in degree. For other reasons it is open to grave objections, and should not be generally substituted for our present methods" (p. 88).

The Police Magistrates of Southwark remark "that the punishment of whipping is prejudicial to the relations between the police and the public, and is liable to lose its efficacy by repetition. It should not be extended" (p. 89).

The Stipendiary of Chatham and Sheerness as to flogging is of opinion that "it would lose its terrorism if made too common;" and "it is an imperfect form of punishment, being inapplicable to girls, and not, according to my experience, useful after a second application" (p. 93).

The Stipendiary Magistrate for the Staffordshire Potteries is in favour of extending whipping to females. "I have had before me girls who have thoroughly deserved whipping, and I do not see any reason for their exemption if the strokes be applied by a female" (p. 104).

The Stipendiary of Swansea is of opinion that "birch-rod, properly used (*i.e.* not so severely as to make a boy a martyr, nor so lightly as to make the whipping a subject of amusement among his companions), is, I believe, the most deterrent, harmless, and appropriate punishment for boys. I think there should be a third alternative, namely, power to order a child to be detained in solitary confinement in a police station, or within the precincts of the Court-house, for any number of hours on the day of conviction up to 8 o'clock P.M., with bread-and-water diet. We have found this simple punishment very effectual at the Reformatory School, and a valuable substitute for the rod, to which recourse is rarely had" (p. 104).

The Magistrates of Ashton-under-Lyne report: "There is much difference of opinion here as to whipping children, but it is generally considered, and the Justices now present are of opinion, that whipping would be a proper and effective punishment in many cases, but would be objectionable in other cases" (p. 107).

The Justices of Banbury report that "the punishment of whipping is not generally so effective as the prison, but in some cases it is to be preferred" (p. 108).

The Magistrates of Wisbeach are of opinion that "whenever corporal punishment is administered to a child, it should be made *compulsory* upon the parents to be present, unless a satisfactory reason be given for being excused from such attendance" (p. 171).

The Justices of Wolverhampton give a lengthy declaration on juvenile offences, and are in favour of whipping, and say "it would be wiser to treat the culprit as a *boy* rather than as a *criminal*, and for boys whipping is the appropriate punishment when punishment is imperative. There might, to meet special cases, be the ultimatum of a pecuniary fine, at the discretion of the bench, but if so ordered, to be *paid by the parents*. A fine to the father in case of his neglect of parental care in the place of a sentence of flogging to the juvenile offender would mostly ensure the appropriate punishment of *both*" (p. 173).

It is somewhat strange to find incorporated with the opinions of the English Magistracy a private letter, seemingly voluntary and unasked, on the subject by a Scotch Justice, Mr. M'Kenzie, J.P. of Inverness and Ross, who gives it as his opinion "that our young customers should be handed over to the Reformatory School straight from the police or Sheriff dock, unless ordered to be *birched by the way*"! and the writer concludes that were "you [the Secretary of State] to give a little more room for birching young offenders there would soon be much fewer of them in the dock, the prison, and the reformatory" (p. 176).

The section devoted to the opinions of the English Magistracy is concluded with letters extracted from the *Times* as to the costs of prosecutions, which are generally out of all proportion to the offence and the fine, and often most arbitrary (p. 177). NESTOR.

Proposed Incorporated Law Society of Scotland.—A meeting of enrolled law agents was held in Edinburgh on the 20th ult. to receive a report from a committee appointed at a meeting held on the 19th December last, and to take such action thereon as might be considered desirable. Mr. Wm. M'Clure of Greenock was in the chair; and representatives were present from Glasgow, Edinburgh, Dundee, Greenock, Dumfries, Perth, Hamilton, Airdrie, Elgin, Falkirk, etc. The report of the committee, *inter alia*, stated that the committee had acted upon the resolutions passed at the meeting last December. These resolutions were: (1) "That in the opinion of the meeting it is desirable

to form a society similar to the Incorporated Law Society of England, which shall be open to the whole legal profession in Scotland, to be called The Incorporated Law Society of Scotland." (2) "That the society shall consist of individuals, and shall not be confined to any branch of the profession, the sole qualification being that the member shall be an advocate or law agent duly admitted to practise before either the Supreme or Local Courts of Scotland." (3) "That a committee be appointed to take the necessary steps for the formation of such a society, to draw up a constitution and rules, and when — members have expressed their intention of becoming members, a meeting be called to consider the constitution and rules drawn up by the committee." The committee nominated had framed drafts of all documents necessary, with the view of an application being made to the Crown for a charter of incorporation. They had thereafter, by issuing a circular to the profession stating the objects and scope of the proposed society, taken means to satisfy themselves that the incorporation of such a society would be heartily supported. They had received assurances of support from 300 members of the profession, and they had reason to believe that this number would be largely increased so soon as the society is actually formed. The committee farther stated that having ascertained that the Lord Advocate would be prepared to consider the terms of the constitution and by-laws, together with any memorial in support thereof, they had prepared, and now submitted for the consideration of the meeting, drafts of a charter and by-laws on the model of the charter and by-laws of the English Incorporated Society, together with a memorial and other documents to be transmitted to the Lord Advocate. In laying this report before the meeting, the convener mentioned that he had received from the Inverness and other important local faculties communications to the effect that they cordially approved of the whole proposals contemplated, and accordingly thought it unnecessary to send special deputations to this meeting. The report having been adopted, the meeting proceeded to consider the various drafts submitted to them. These were generally approved of, and were ultimately remitted to a committee, consisting of Messrs Spens, Glasgow; M'Clure, Greenock; Cameron, Elgin; Gair, Falkirk; Dougall, Ayr; Downie, Glasgow; Shaw, Glasgow; and Barty, Dunblane, finally to adjust. Power to take other steps necessary towards an incorporation of the society was also conferred on the same committee.

Police Superannuation.—A return was recently made to the House of Commons under the heading of "Police Superannuation," and which gives a number of minute details with respect to the constitution of the police force throughout England, Wales, and Scotland, contains some interesting information with regard to the mean strength of the force in the different parts of the country, and the number of men who have served long enough to earn a pension.

Thus, in the English and Welsh counties no fewer than 1234 men are required for the maintenance of the peace in Lancashire, and 933 in the West Riding of Yorkshire, while sixteen answer the same purpose in Radnorshire, and twelve in Rutland. In Lancashire there are 246 pensioners, drawing £11,160; in the West Riding 134, drawing £5736; while in Radnorshire there are only two, drawing £90, and none at all in Rutland. Of the English and Welsh towns (omitting the metropolis) Liverpool and Manchester are at the top, with 1216 and 879 men respectively, and Bewdley and Daventry at the bottom with two each. There are no pensioners in either of the latter boroughs, but in Liverpool 110 pensioners draw £4285, and in Manchester 133 draw £5300. Turning to Scotland, it appears that a much smaller number of men are sufficient to keep order—at all events in the counties, as there are no more than 244 men in Lanarkshire, which is at the head of the list, with Ayr next with 122, and in Cromarty two men, and in Kinross five, are all that are considered necessary. Of the towns Glasgow is far ahead with 1032 men, while Edinburgh follows with 401, and Alloa, Brechin, Elgin, and Renfrew bring up the rear with six each. The only instances of pensions recorded in these towns and counties are twenty-two in Edinburgh, and one in Ayr. It is not very easy to know what deduction to draw from these figures, as it may well be that one district is over and another undermanned, and the larger number of men in some places, which would seem to afford an increase of security, may on the other hand serve to indicate that there is there a greater need of it. However, the fact remains that, as a rule, it is found possible in Scotland to do with a smaller number of police than in England and Wales, and this can hardly be ascribed in all cases to the scanty population; but some credit must be given to the people for finding less work for the ministers of the law to do.—*Law Times*.

Law Reports.—When Mr. High asks, "What shall be done with the Reports?" we answer, Simplify them, condense them, and make them funny. When we started out in our youth to endeavour to infuse a little sportiveness into law reports, we little thought we should so soon have two such promising disciples as Mr. R. Vashon Rogers, jun., of Toronto, and Mr. John D. Lawson, of St. Louis. Mr. Rogers has made several successful ventures in this line, such as "Rights and Wrongs of a Traveller," "Law of Hotel Life," etc.—successful at least on this side of the Atlantic, although, we believe, the English, who uniformly praise our worst humourists, have been rather shocked at our innocent attempts, and have viewed their own delightful author of "Scintilla Juris" somewhat askance. Now comes Mr. Lawson, author of several successful serious treatises—or rather he is coming—in a volume of "Leading Cases Simplified," of which some advance sheets have reached us. They are of excellent quality, and make us impatient for the completion

Among the best of those which we have before us is the report of *Connecticut, etc., Ins. Co. v. Schaeffer* (94 U. S. 457) as to who may insure the life of another. A wife, who had insured her husband's life, got divorced, and remarried before his death, and when she asked for her money, the manager asked her if she had ever heard of Boldero (*Godsall v. Boldero*, 9 East, 72). Upon her telling her lawyer this, he directed her to ask the manager if he had ever heard of Dalby (*Dalby v. India, etc., Life Ass. Co.*, 15 C. B. 365). The report of *Thurston v. Union Pacific R. Co.* (4 Dill, 321) is also well told, as follows: "Thurston was a bad man to meet on a railroad train. And yet travellers were very apt to run against him, for his business called him there very frequently. His sole stock-in-trade was three pieces of pasteboard, and he earned his living by making small bets with unsophisticated grangers, whom he generally met in the smoking-car, concerning the identity of a particular card of the three. After the game was over, and when the shekels of the rural inhabitant were deposited in the pocket of Thurston, what used to puzzle the granger was how it came about that whenever he bet a small sum, he could generally locate the right card, and whenever he put up his pile, he always selected the wrong one. It was this sort of thing that gave Thurston the name of 'monte-man,' and that one day having purchased his ticket on the defendant's road, caused the conductor of the train to prevent him from boarding it." Then follows the decision, briefly told. Our experience of these humorous reporters (leaving out ourselves, of course) is that they report the law more accurately, briefly, and impressively than the official reporters, and throw in the amusement. We hail the accession of Mr. Lawson to the ranks of our select few who do not deem the practice of the law necessarily a penance.—*Albany Law Journal*.

The Army (Annual) Act.—The Army (Annual) Act, 1882 (45 Vict. c. 7), one of the nine statutes which Parliament has succeeded in passing this session, contains two very remarkable sections. The 4th section, after reciting that "the misprints hereinafter mentioned occur in the Army Act, 1881, and it is expedient to amend the same," sets out no less than six cases in which certain words are to be "substituted" for certain other words occurring in different sections of that Act. The propriety of the amendments may be indisputable, but it is difficult to see how the word "misprint" can have come to be used. For instance, sub-section 2 of the 4th section enacts that "in section eighty-seven of the Army Act, 1881, the words 'a proclamation in pursuance of the enactments relating to the calling out of the reserve on permanent service' shall be substituted for 'a proclamation in pursuance of this Act' in the first sub-section." This amendment was surely suggested by an afterthought, and the words originally printed could not have been "misprinted" in the ordinary sense of the

term. Misprints, in the proper sense of the term, are of course unavoidable, the two most salient instances of late years being perhaps the printing of "that" for "this" in section 11 of the Burial Act, 1880, which was solemnly corrected by the Burial and Registration Acts (Doubts Removal) Act, 1881, and the omission of "same" after "the" in section 36, sub-section 4, of the Taxes Management Act, 1880—an omission which, though it makes the section "insensible," is still uncorrected by Parliament. It is provided also by the 6th section of the Army Act that "in all copies of the Army Act, 1881, which may be printed after the commencement of this Act, the words by this Act directed to be substituted for other words shall be printed therein in lieu of the latter words, and the words directed by this Act to be added shall be added thereto. This is quite a novel enactment, and might cause some confusion in the case of the two rival copies of the Act of 1881 being used on the same occasion. To make the enactment of real use, all the old copies should be "called in," like old threepenny pieces when new ones are issued. Even in such a case, however, no legal presumption would arise that the Queen's Printer's copy was the correct one. In the case of a local Act, no doubt, a Queen's Printer's copy is evidence of the contents of an Act of Parliament, by 8 and 9 Vict. c. 113, s. 3. But in the case of a public Act, the only mode of authenticating the contents is a reference to the Parliament Roll (see *Reg. v. Hastingsfield Overseers*, L. R. 9 Q. B. 209), in which, however, clerical errors must occasionally occur (see *Lyde v. Barnard*, 1 M. & W. 115).—*Solicitors' Journal*.

The Bluntschli Memorial.—We have been requested to bring under the notice of our readers the efforts which are now being made by the admirers of the late Professor Bluntschli of Heidelberg to commemorate the great services which he rendered to almost every department of jurisprudence, by a foundation similar to that which was instituted to do honour to Savigny. As Bluntschli's fame was European, and his labours, in later years, chiefly took the direction of Public International Law, it is desired that the memorial should have an international character. Committees have, consequently, been appointed to carry out this scheme in all European countries and in America. The form which it is intended that the memorial should take is that of prizes to be awarded for publications and memoirs on subjects connected with International Law, to be written in any of the principal living languages, or in Latin. The decision of the prizes is to be intrusted to the common action of the Institute of International Law, of which Bluntschli was one of the founders, and to the three academical Faculties of Law, to which he successively belonged. Liberal subscriptions have already been promised in England, and it is hoped that Scotland will not fail to exhibit the same interest in so good a cause.

Subscriptions may be sent to Professor Lorimer, Kellie Castle,

Pittenweem, Fife; who has been appointed member of committee for Scotland.

AUTUMN CIRCUITS.

SOUTH.—The Lord JUSTICE-CLERK and Lord DEAS.

Ayr—Tuesday, 1st August; Friday, 1st September.

Dumfries—Tuesday, 5th September.

Mr. RICHARD VARY CAMPBELL, Advocate-Depute.

ÆNEAS MACBEAN, Clerk.

WEST.—LORDS YOUNG and MURE.

Glasgow—Tuesday, 22nd August, at half-past ten o'clock.

Stirling—Friday, 25th August, " "

Inverary—Wednesday, 30th August, " "

Mr. ÆNEAS J. G. MACKAY, Advocate-Depute.

J. M. M'COSH, Clerk.

NORTH.—Lords CRAIGHILL and ADAM.

Aberdeen—Tuesday, 5th September.

Dundee—Friday, 8th " "

Perth—Tuesday, 12th " "

Inverness—Thursday, 14th " "

Mr. ALEXANDER TAYLOR INNES, Advocate-Depute.

HORACE SKEETE, Clerk.

The Scottish Law Magazine and Sheriff Court Reporter.

SMALL DEBT COURT OF LANARKSHIRE (HAMILTON).

Sheriff BIRNIE.

THE SINGER MANUFACTURING COMPANY v. WILLIAM DOCHERTY.—May 26, 1882.

Landlord's hypothec—Hired articles.—*Held*, that a landlord's hypothec does not extend over an article in the tenant's possession under a contract of hire with the option of purchase.

Opinion.—"In this case the Singer Manufacturing Company sue a landlord for £6, 10s., the price of a sewing-machine sold by him under a sequestration. The machine was in the possession of his tenant under a printed agreement, by which she was bound to pay 2s. 6d. per week of rent, and at any time entitled to purchase the machine on paying the difference between the sums paid and the £6, 10s., the pursuers, on the other hand, being entitled to retake possession if the weekly payments were not regularly paid. The public were made aware by advertisements, reported decisions, and otherwise, that the pursuers, along with an ordinary sale business, carried on business on these terms.

"The sequestration was for the rent due at last Martinmas, and the machine was delivered to the tenant and had been in the defender's house since the month of February previously.

"The pursuers take certain special pleas which it is unnecessary to decide.

"Their general plea is that under their practice of hiring and the publicity given to it, they are entitled to reclaim their machines when sequestered for rent; and the defender's answers are—(1) that hired furniture is liable to a landlord's hypothec, and (2) that the pursuers' agreement is virtually a sale and not a hire.

"It has been decided that hired articles, except on the ground of reputed ownership, do not fall within a mercantile sequestration (*Marston v. Miller*, May 13, 1879, 6 R. 898; *Duncanson v. Daniels* (Jeffries' Trustee), March 4, 1881, 8 R. 563), and that they can be reclaimed from a creditor of the hirers if wrongously pledged (*Muir & Wood v. Moore & Kidd*, January 19, 1876, Guthrie's Cases, 445; Sheriff Guthrie).

"It has been further decided in cases with the pursuers' company, that the pursuers, under similar agreements to the present, are entitled to reclaim their machines from pawnbrokers (*The Singer Manufacturing Company v. Clark*, 1879, L. R. 5 Ex. 37; *Moffat v. Adams* (County Court), January 20, 1877, *Law Times Journal*, p. 210; *Singer Manufacturing Company v. Mullan*, April 6, 1882, Sheriff Court of Fifeshire, April 8, 1882), from a purchaser without notice (*Singer Manufacturing Company v. Donald & Andrew Ross*, Sheriff Court of Ross-shire, March 28 and April 2, 1881), and from a pouncing creditor (*Singer Manufacturing Company v. Jessiman*, Sheriff Court of Aberdeenshire, January 15, 1881). But the question remains if they can reclaim from a landlord selling under a sequestration.

"It seems to me that a landlord's hypothec is based on the same considerations as regulate the rights of other creditors, with the addition that articles liable to it must be on his property. There are decisions, no doubt, which appear to go further, and imply that every article found on his property is subject to his hypothec (*Hunter on Landlord and Tenant* (Guthrie), vol. ii. 375), but at all times there have been exceptions to this, and the sounder view appears to be that his right, like that of other creditors, rests on reputed ownership. It was so held by Sheriff Barclay of Perthshire in the case of *Milne v. The Singer Company* (July 29, 1881, *Journal of Jurisprudence*, vol. xxv. p. 499). Keeping in view the decisions in the cases of *Marston v. Miller* and *Duncanson v. Daniels*, I do not think the defender has proved reputed possession.

"I have had considerable difficulty as to the defender's plea that this is not really a hiring, but a sale payable by instalments, the circumstances being somewhat similar to those in the case of *Cropper v. Donaldson* (July 8, 1880, 7 R. 1108), where it was so held. But I have come to think that this is an agreement of hire. Between the pursuers and the defender's tenant it was undoubtedly a hire, and although it may have turned out a bad bargain for the tenant or her creditors, that consideration does not change its nature. This was the view taken in the case of *Singer Manufacturing Company v. Jessiman* (Sheriff Court of Aberdeenshire, January 15, 1881), in which the case of *Cropper v. Donaldson* was commented upon."

Act.—Young & Son.—Alt.—Archibald & Kay.

SHERIFF COURT OF PERTH.

Sheriff BARCLAY.

M'INTOSH v. M'CALLUM.

Jurisdiction—Custody of illegitimate child.—The mother of an illegitimate female child presented a petition to the Sheriff craving that the defender should deliver to her the child, and failing delivery for a warrant to officer of Court to search for and to take possession of the child, and for interdict against the defender interfering with the pursuer's possession of her child. The defender pled that the Sheriff had no jurisdiction in such cases, and that the

child had been intrusted to his wife by the parents. The following interlocutor was pronounced :—

"*Perth, 7th October 1881.*—Having heard parties' procurators and made avizandum with process and debate, Finds—

"First, The pursuer brought forth a female illegitimate child on 9th June 1877 in the house of her brother, John M'Intosh.

"Second, The putative father of said child was William Kennedy, who at the time resided in the house of the said John M'Intosh, and the child received the name of Margaret Jane Kennedy.

"Third, The said William Kennedy remained in the house of John M'Intosh until about the month of March 1879, when he and the child removed to the house of the defender, who is a cousin of William Kennedy.

"Fourth, William Kennedy died in the defender's house on 18th June 1881, leaving a testament in favour of his said daughter Margaret Jane Kennedy, and nominating the defender as his executor.

"Fifth, The said child has never, or at least not for a long time, been in the custody of the pursuer, but in the custody of her brother's wife, and latterly, since March 1879, in the custody of the defender and his wife.

"Sixth, The pursuer now claims the custody of her child, but she admits that she is in domestic service, and has at present no dwelling, but she desires to place her child in the former custody of her sister-in-law M'Intosh. Under these circumstances, Repels the plea of no jurisdiction in this Court, but finds that there being no objection stated to the present custody and care of the child, and the pursuer does not ask personal custody, she is not entitled to invert the present custody : Therefore dismisses the action : Finds the pursuer liable to the defender in the expenses of process (less one-fourth in respect of the preliminary plea) : Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and to report, and decerns.

HUGH BAROLAY.

"*Note.*—It is trite law that legitimate children are for a season under the joint care and custody of their parents. The father has the chief control, the mother having certain claims of custody. In case of a difference and a separation of the spouses, the Supreme Court has the sole power to decide as to the claims of custody, in which questions the children's interests are chiefly taken in view. The Sheriff may even in such cases interfere as to interim custody, and to prevent cruelty to the pupils.

"It is different in the case of *illegitimate* children. By a strange figure or fiction in law, they are held to have *no father*. The mother up to a certain age has the *sole* custody, and the law in all its jurisdictions, supreme as well as inferior, may interfere to support the mother's custody and protect the child. At certain ages the putative father can offer to take the custody or provide in future for the child. If the mother declines to give up the custody (she may still maintain the custody), the only penalty applicable to her refusal is a cessation of her claims for aliment. At no period can the putative father deprive the mother of her natural right of custody. It would be monstrous that in all cases of illegitimate children the regulation of the custody could only be decided by the Supreme Court. This in effect would be to exclude the majority of such cases from justice. The mother has a paramount claim to the custody of her illegitimate offspring superior to the father, and more especially to strangers.

"She is entitled to defend the custody where she has it, and to insist on its restoration where she has lost it. It has been found that even where she has married and become mother of children by another man, this is no bar to her keeping the custody of her illegitimate children born before marriage. A case which occurred in this Court in 1861, and is fully reported in Guthrie's Select Cases (p. 260), gives all the details of prior decisions on the question of jurisdiction.

"In this case it is not the mother that is sought to be deprived of the

custody of her child. She never had the custody except perhaps for the few months of nursing.

"She voluntarily parted with that custody to the putative father, who placed the child when born in the custody of the wife of the pursuer's brother.

"The father and his child removed in the year 1879 to the house of the defender, where the child (now about four years old) has since and is now being brought up with the defender's other family. The putative father has left a testament in favour of his child, whereby it is said about £100 is her portion. The defender is the executor, and has therefore the charge of means of her support. No accusation is made against the mode in which the child is cared for. On the other hand, the pursuer has no house, and desires the child to be placed, as at first, in the care of her sister-in-law, but does not express any desire for the *personal* custody, which indeed she is prevented taking from her present position.

"The change of custody was made seemingly with the pursuer's consent, as well as that of Mrs. M'Intosh, the first custodier, and it appears harsh in the extreme once more to change the custody of the young child for no apparent benefit to her. It is possible that the circumstance of Kennedy having, very properly, left all his means for his child may have influenced the maternal feeling in the pursuer's bosom, so long dormant.

"The defender being the custodier and administrator of the fund, points him out as being best fitted for the custody and upbringing of the beneficiary. The Sheriff-Substitute shudders at the notion of granting warrant to officers of Court to tear an infant from its accustomed associations and guardianship, and to have it forcibly removed to new quarters. He has often done so with brute animals, but it is wholly different with a little rational and sensitive being. Nevertheless, had the petitioner a proper and fitting place to exercise her care and charge, it might be possible to overcome these feelings so as to give her her right of custody. H. B."

The judgment was acquiesced in, and no appeal taken.

Act.—Forbes.—Alt.—M'Leish.

Notes of English, American, and Colonial Cases.

CARRIER.—*Negligence—Temporary loss of goods—Carriers Act* (11 Geo. IV. and 1 Will. IV. c. 68), *sec. 1—Consequential damages.*—The plaintiff delivered to the defendants, carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence by ship to Italy. The trunk contained wearing apparel, consisting of silk dresses and other articles within the Carriers Act, exceeding £10, but no declaration of their value was made. Owing to the defendants' negligence the trunk was sent to the Victoria Docks in London, and thence shipped to New York. It was eventually recovered, and, after considerable delay, delivered to the plaintiff in Rome. Some of the contents were injured owing to the Custom-House officer in New York unpacking and negligently repacking the trunk. The plaintiff having claimed for the loss of the trunk and injury to its contents, and also for the cost of repurchase of other articles in Rome at enhanced prices, it was, *held* (by Lopes, J.), on further consideration—first, that the defendants were protected by the provisions of the Carriers Act from liability for the loss of the trunk and injury to its contents, notwithstanding that the loss was temporary; secondly, that the trunk was lost on the land journey within the meaning of the Act the moment it was despatched on its wrong road to the Victoria Docks; thirdly, that the plaintiff was entitled to recover as damages for non-delivery within due time the cost of the repurchase of other articles at Rome at enhanced prices.—*Millen v. Brash & Co.*, 51 L. J. Rep. (Q. B. D.) 166.

THE JOURNAL OF JURISPRUDENCE.

THE CAUSES, THE CONSEQUENCES, AND THE CURE OF THE OVER-CONCENTRATION OF THE MASSES IN GREAT CITIES.

IN attempting to handle such a subject as the present, the most simple and natural analysis will probably be the best. I shall, therefore, consider in the first place the causes, economical, social, and political, which have rendered and are rendering the town attractive and the country repulsive; I shall then indicate the chief effects which the centralization of the masses in our large cities tends to produce; and finally I shall endeavour to point out how the evils of this centralization may be mitigated or counteracted.

The questions to which I would now offer an answer are—

1. Why do such masses of human beings leave the country?
2. Why do they crowd into the town?

1. The abandonment of the country may, in my opinion, be traced more or less directly to the following causes:—

A. The general policy of Europe has been unfavourable to the systematic cultivation of land and to the maintenance of an intelligent and independent agricultural population, by treating land not as a commodity belonging ultimately to all, but as the hereditary birthright of a few.

Among the Teutonic tribes the possession of land was the avenue to wealth, power, and consideration: only the landed man was truly free, he alone could vote for peace and war, take part in the early councils of State, and share in the appointment of the officers of justice.

Feudalism accepted the foundations already laid, and reared upon them a superstructure peculiarly its own. The king or duke, as the case might be, was the divinely-appointed governor of the people

to whom the earth and its fulness exclusively belonged: his vassals, from the highest to the lowest, received whatever portion of the soil they were permitted to enjoy, not because of any inalienable right resting in them, not because of prescription or custom, but merely because the royal domains were too vast for a single man to superintend. The tenant was only a servant and had to render a perpetual account of his stewardship. A number of feudal services—some heavy, others light, but all annoying—cramped his energies and destroyed his independence. From this real, if not nominal slavery, the agricultural population struggled desperately to be free, but the Pharaohs of medieval Europe kept them fast to their menial position as hewers of wood and drawers of water.

No one can form any conception of feudalism who has merely studied it in the Statute-Book. It is in the light of medieval literature alone that we can trace its influence on the public and private relations of individual and national life. We see it elevating a small number of men at the expense of the community, fostering an intense *esprit famille*, generating in the master all the cruel vices of the tyrant and in the servant all the petty meanness of the slave, realizing the bitter taunt of the leveller, that God had sent the few into the world ready booted and spurred to ride, and the many saddled, bridled, and ready to be ridden.

Such, with a few conspicuous and highly honourable exceptions, were the moral and social effects of feudalism. Its economic effects have been equally injurious. The whole presumption of the law was in favour of the landlord; every conceivable disability was heaped upon the tenant. Several European nations attempted to cast away its intolerable yoke, but the dead principle of feudalism still held in its iron grasp the remnants of the once boundless powers it had exercised. The tyrant was dead, but the tyranny was still alive.

I shall now briefly enumerate the chief economic results of the feudal system, and to prevent the tedium of endless repetition and subdivision, shall treat in this connection the whole land question in so far as it falls within my subject.

(a) The customs springing from feudalism have tended to discourage agriculture. Under this head must be included the long leases of Scotland, the short leases of England, or the absence of any leases at all, the wretched cottierism of Ireland, the *métayer* tenure of the Continent, and high rents whenever these are determined by other agencies than competition; to the same category may be referred the custom as distinguished from the law of primogeniture. When taken along with bad seasons, increasing or stationary population, and diminishing returns, they are subordinate and local, but none the less real causes of agricultural depression.

(b) The laws arising from the feudal system have had the same injurious effects as the customs which they stereotyped. Into this class we place the law as distinguished from the custom of primo-

geniture, the laws of entail, distress, hypothec, and fixtures, the expensiveness and obscurity of titles, and the want of compensation for improvements. The indictment which may be presented against these laws and customs is equally applicable to the system as a whole. It has stunted the growth of country life by depriving the rural population of any permanent connection with or hope of acquiring land, by confirming the exclusive ownership of the privileged upper classes, and by throwing its weight and authority upon their side.

B. The general policy of Europe has been unfavourable to agriculture, by imposing prohibitory and restrictive duties upon inland produce.

Let us take the Corn Laws as our example. The corn trade, we are told by Adam Smith, consisted of four great classes—the dealers or middlemen, the importers, the exporters, and the carriers. The dealers were regarded with ill-concealed aversion as the cause of every period of famine and depression; the ogres who were fattening on the starvation and misery of the people. The Government in its wisdom determined to destroy their gains, and to bring the consumer and the producer face to face. They had their desire; the price of wheat was fixed; the obnoxious middlemen abandoned a calling no longer lucrative. And what was the result? Merely this, that the farmer produced less, as he had now to perform two functions instead of one, and the people paid higher prices than before. The restraints upon the importation of corn magnified the office of the smuggler and made it honourable, while the encouragements to exportation were hurtful where they were unnecessary, and unnecessary where they were not hurtful. The Navigation Laws again, which were for a long time regarded as the masterpieces of political acumen, merely impoverished ourselves. Examples might be indefinitely multiplied, but the symptoms are in every instance the same. *Ex uno disce omnes.*

C. The "progress of civilization" tends to destroy rural life as a whole, and to assimilate the country with the town. I have employed this vague phrase "progress of civilization" in order that I might include the influence of free-trade on the external aspect of the countries, and on the moral and social character of the peoples which profess it. I am a devoted adherent of the doctrine of free-trade, and agree with J. S. Mill's statement of the theory of reciprocity, that "the great manufacturing population must starve in order that the small agricultural population may—starve also." I shall, however, endeavour to state the case for the reciprocitarian as clearly and as candidly as possible, relying on the writings of Mr. Ruskin and an able article published in the *Nineteenth Century* by Mr. Wallace for my data. Both of these gentlemen pursue different methods and arrive at the same result. The coalition between them is highly amusing and instructive. Mr. Wallace is a scientist of great reputation and ability, Mr. Ruskin an artist whose theories of

trade are the mere whims of personal fancy, only redeemed from ridicule by the deep earnestness and musical sweetness of the language in which they are expressed. Their charges against free-trade may, as it seems to me, be resolved into one of two classes—the economic or the sentimental. Political economy, we are told, does not teach anything, and must not be confounded with the law which it interprets. From this it follows that free-trade is not a universal irrevocable principle, but “a maxim of expediency” adapted to and dependent on particular circumstances. When the scientific statement has been completed, the *argumentum ad verecundiam* begins. We are supplied in well-chosen and alluring colours with a sketch of the seclusion, the self-sufficiency, and the virtue of our early rural villages before the harsh law of free-trade burst in, with the hoarse roar of steam-engines and the foul smoke and stenching odours of factories, to dispel the picturesque pleasure of the scene. On such grounds as these the defence of reciprocity is made to rest, and for the sake of completeness I shall silently acquiesce in it and include free-trade among the causes of rural decay.

D. The abandonment of the country is the result partly of ignorance and partly of education.

The average countryman, without appreciating the advantages of the country or knowing anything of the disadvantages of the town, longs to escape from the monotony which he identifies with the one and to reach the variety which he associates with the other. He sees his brothers, his children, and his friends join the multitudes which sweep annually from our quiet rural districts to the giddy pleasures of some modern Vanity Fair. They soon return, active, sprightly, and acute, to decry his simplicity, to laugh at his ignorance, and to parade their own intimate acquaintance with men and things. He has the keenness to perceive, without the good sense to accept, his situation. He will make up for the time which he has lost—the past may be redeemed though it cannot be recalled. Fortunes, he argues, are made easily in the city, and there is no reason why hard-working enterprising labourers should not be the men to make them.

Half-developed intelligence is as fruitful a source of rural decay as the grossest ignorance; in the transition state from darkness to light there is little indeed to choose between the deep gloom in which we see “men as trees walking” and the total blackness in which we do not see at all. “A little learning,” sang the great satirist, “is a dangerous thing,” and posterity has freely indorsed the sentiment.

2. The concentration of the masses in large cities is due to three causes.

A. The town is the great centre of commercial industry and enterprise, and as such offers the highest inducements to able, ambitious, and persevering men.

I wish in the first place to draw a distinct line of demarcation

between necessary and excessive centralization. A concentrated population is the invariable concomitant of every commercial and industrial city. Division of labour in its very essence implies a numerous population among whom the labour can be divided. The advantages of a highly-organized industrial system, formulated originally by Adam Smith and developed by Mr. Babbage and Professor Jevons, are among the commonplaces of political economy and do not need to be enumerated.

But it is with the division of labour, which Ruskin says "means division of men," and with the concentration which is injurious alike to the souls and bodies of our fellow-creatures, that we have here to do. This evil I have no hesitation in attributing *generally* to the tendency of all progressive nations to push principles into excess, and in particular to the commercial spirit of our own country. "All philosophical sects," wrote M. Garnier, "owe their first foundation to the discovery of some great truth, and it is the madness inspiring their members to deduce everything from this new discovery that contributes to their downfall." *Mutato nomine*, the criticism exactly applies to ourselves. We got hold of an excellent principle in freedom of contract and trade, a principle which lies at the root of the English and all sound political economy. But we would admit no modifications; we would recognise no conditions; we never imagined that "freedom of contract" might be "freedom of slavery." Unpleasant as the confession may be to our proverbial national conceit, we are essentially a "nation of shopkeepers." "The nation exists for commerce, and not commerce for the nation."

This spirit may be traced in the iniquitous state of the factories before the reign of Queen Victoria; in the separation of our academies into two mutually exclusive sections—classical and commercial; in the high premium which the Civil Service Commissioners set on mathematics and the exact sciences in the examination which selects the future rulers of India; and in the pitiable desire to distort our magnificent language, pregnant with hidden meanings and rich in historical associations, in order, forsooth! that a parcel of idle schoolboys may be sent twelve months sooner to soil paper and destroy pens in their fathers' offices.

B. The town offers the greatest variety of pleasure to the votaries of fashion and amusement.

The noblest and vilest of human appetites alike can be fully satiated in a great city. The attractions of literature and art, the allurements of music, and the love of gay company and good living are intensified by the sympathy of fellowship; while the relish of darker and more brutal enjoyments, which the law discountenances and on which society frowns, grows keener from the sense of security and concealment. Vicious indulgences which would in half an hour be proclaimed from the house-tops of the country may be safely practised for a lifetime in the secrecy of the town.

I come now to consider the effects of the phenomenon whose causes I have attempted to analyze.

I. What are the effects upon the country of the over-concentration of the masses in great cities?

(a) On the physical appearance of the country. The decay of the rural population has transformed the districts in which such decay has taken place into one vast deserted village. It is so in our Lowland and in some of our Highland counties. Industry is gone; the weaver's loom is silent; the farm-steading is abandoned; houses are overthrown; everything has the appearance of that deep valley of dead bones on which the great prophet looked sadly down, or of that heathen army against which the fiat of the God of Israel went swiftly forth. The semblance of life only makes the presence of death more ghastly and appalling.

(b) On the residents in the country. The immediate effect of the depopulation of the country upon those who remain in it is that their manner of life becomes disreputable in their own eyes and in the estimation of the public generally. Occupations and pursuits from which capital and labour shrink away, and which offer no inducements for the present and no prospects in the future, however great their intrinsic importance, are soon despised both by those who are engaged in them and by the outside world which regards them from a distance.

II. What are the effects of the over-concentration of the masses upon the cities in which they congregate?

(a) On the physical appearance of the cities. Every great city gradually comes to consist of two parts, one for the rich, another for the poor: the former is opulent, comfortable, and spacious; the latter narrow, squalid, and miserable. Though living in such close proximity, these classes know little or nothing of each other; no Indian castes are more absolutely exclusive; the passage from the lower to the upper world of antiquity was not more hopelessly barred. The dark chasm too which separates them is not in the slightest degree bridged over by the middle class. The merchants, traders, and professional men who constitute this class are gradually but certainly drawing themselves nearer and nearer to their superiors in social rank and consideration. Intermarriage and professional or commercial intercourse are welding them firmly together. Their houses are as fine, their tastes as cultured, their independence as complete as those of the men with whom they are being assimilated. They disown all connection with the great unwashed, and thus the gulf of which I have spoken remains unbridged, and the composite nature of large cities is a universal law of modern civilization.

(b) On the character of the residents in the town. The best men crowd into the cities, where the hardest work has to be done and where the highest prizes may be gained. To do this work and to make those tempting gains their own, their strength of body and

mind is taxed to the utmost. The professional man is exposed to constant intrusion and perpetual annoyance; the merchant can hardly relax for a single moment the fearful mental strain of vital interest at stake and great wealth intrusted to his care; even in the hour of prosperity, if he is a true man of business, he will be "still plucking the grass to know where sits the wind," and thinking of his argosies freighted with precious cargoes and bound for the most distant shores. The trader too has his own share of difficulties and sorrows to encounter, the bitterness of feeling that, in spite of every effort, he is not one whit the nearer comfort and repose. Thus in the hurry and bustle of great cities the best human lives are frittered away, "a youth of labour" bringing in many cases "an age" of poverty and misery, not of ease.

Again, the worst men crowd into the cities, and vice, disease, and immorality flourish. In a general essay like the present it would be equally unnecessary and unbecoming in me to enter upon the statistics of crime in detail. I may rest content with affirming, what no one who has consulted such statistics can deny, that habits and vices which are comparatively innocuous in the country become most injurious, and in many instances speedily fatal, when practised in the town.

Finally, an intermediate class congregate in our large cities—Mr. Feeblemind, Mr. Littlefaith, and Mr. Ready-to-fall. They come for the most part with high hopes, with good intentions, with vague longings after honour and fame. But they are unable to sacrifice present enjoyment for future advantage, and to seek the realization of their ambitious dreams in the routine of everyday life. We may say generally that the effect of this over-concentration of the masses in great cities is to bring into immediate prominence several important questions in social and political science.

I. The Population question. Does this over-concentration with which we are dealing impede or promote the growth of population? In answering this question the greatest doctors disagree. The fecundity of the human animal, Mr. Doubleday assures us, is in inverse proportion to the amount of nutriment consumed: by a physiological law an underfed population multiplies rapidly, an overfed population very slowly. As a closely-concentrated population can hardly be overfed, I presume that Mr. Doubleday meant to indicate that over-concentration was favourable to an increase of population.

Mr. H. C. Carey, the great bulwark of protectionism in America, propounded a theory of his own, the two main features in which seem to be the following:—

(a) That population diminishes as civilization advances, from the severe mental labour which individuals have to undergo.

(b) That nature will not develop the higher faster than the lower forms of existence.

The first argument is untrue in fact; the latter is irrelevant even though it were true.

But the most remarkable theory of all was laid down by Mr. Sadler in what he was pleased to term a "New Law of Population." Reiterating the absurd and hackneyed charges of immorality and atheism against Malthus, Mr. Sadler maintained that population was in inverse ratio to its density, and that therefore the grand cure of over-population was—over-concentration! The foot of retribution did not tarry long. In two very able and brilliant papers, now retained in his "Miscellaneous Writings," Lord Macaulay proved that Mr. Sadler did not understand the meaning of the term "inverse ratio" at all; that neither in Mr. Sadler's nor in any other sense was his statement true, and that the so-called law, even if it had been true, was liable to precisely the same objections which Mr. Sadler had urged with such fiery indignation against Mr. Malthus.

To whichever of these theories we may give in our adherence, this at least is certain that the population question becomes more and more pressing with every improvement in civilization.

II. The Poor Law question. If it be true that the tendency of a densely-crowded population is to sink in moral, social, and physical condition, it follows immediately that such a population will, *cæteris paribus*, continue to sink, and that the process of degradation will be accelerated by the consciousness of the ultimate support which the Poor Law offers to every man, however vicious his life or improvident his habits may have been.

III. The Contagious Diseases question. The consequence of over-population and over-concentration is immorality, and the consequence of immorality is disease. The records of our model lodging-houses and the stray confessions of the inmates of some Magdalen Hospital pronounce it to be impossible to restrain passion or preserve decency in the densely-crowded houses of our great cities.

IV. The recurrence of financial and commercial crises. From 1795 till 1876 there have been at very regular intervals a succession of cycles of inflation and depression, accompanied with great dissatisfaction and distress. The sympathy of numbers is very apt to deepen such dissatisfaction into mutiny—witness the famous Lancashire strike of 1870—and the presence of a closely-concentrated labouring population intensifies every period of danger and distress.

Finally, individuality of character, intelligence, and culture tend to deteriorate or perish altogether in the midst of the centralization of modern city life.

"No society," wrote John Stuart Mill, "is in a wholesome condition in which eccentricity is a matter of reproach;" and this seems to be the invariable and natural consequence when men are perpetually reminded that they are merely units in a great mass, and not individuals with an identity and personality of their own.

Having thus analyzed the chief causes and effects of the centralization of population in great cities, I come now, in conclusion, to discuss the remedies by which these may be neutralized or removed. If we are convinced that over-concentration is an evil, we are not at liberty to adopt the *Fata viam invenient* of antiquity, but are bound to attempt something for its cure.

There are two alternatives before us. We may either accept over-concentration as inevitable, or regard it as a transitory, abnormal phenomenon which can and ought to be counteracted. In the former case, we have merely to mitigate its effects; in the latter, we must destroy the causes which produce them. The desired result may best perhaps be obtained by a combination of both methods, and upon this hypothesis I shall proceed.

(a) We must endeavour to throw life into country communities, and to unite what is best in the country with what is best in the town.

The good sense and fine taste of the civilized world are already acting upon this principle. The country is growing up in the town. Men of business no longer live above the offices where they are compelled to work. They hurry away from the din and bustle of the great city at nightfall to the quiet seclusion of home. The modern ideal of a great city is to be found not in Leadenhall Street, but among the villas of Bayswater and Kensington. In the same way the town is growing up in the country. Improved means of communication knit the two very closely together: the commercial wealth of England acts and reacts upon her agricultural and rural prosperity. The life of our country villages may be quickened in many ways. Reading-rooms, institutes, and clubs can be established, industry can be encouraged, lectures and concerts arranged. The management, too, of our circulating libraries ought not to be left to the good pleasure of every private adventurer; society should not look calmly on while the taste of its members is vitiated and their mental calibre destroyed by the refuse and trash of literature. The object of every librarian, or of the public which acts for him, should be, in Montesquieu's fine language, to accumulate, not the books which will "be read," but those "which will incite the reader to thought."

(b) Every individual is entitled to receive such education as will enable him to estimate at their proper value the comparative advantages and disadvantages of town and country life.

This education should be general, not technical; primary, not secondary. In this the answer to the absurd objection against national education really lies. The education which should be extended to all classes does not aim at conferring upon them useless accomplishments, but at making them practical men and women, fertile in devising expedients and in calculating chances, able to grapple with difficulties and to overcome them.

(c) The progress of over-population must be averted by the

influence of public opinion acting upon law and custom. It is only thus that the danger can be counteracted and the evil cured, and not by the Neo-Malthusianism of Mr. Bradlaugh and Mrs. Besant, which is equally insulting to science, Christianity, and human nature.

(d) A resolute effort must be made to deal with the question of pauperism.

Every system of Poor Laws has to encounter three great difficulties.

1. That of distinguishing between those who do and those who do not deserve its assistance.

2. That of combining the effectual relief with the repression of pauperism.

3. That of inciting the poor man to preserve and the pauper to regain his independence.

The best system of Poor-Law relief might perhaps be obtained by a combination of Mr. Goschen's famous "Metropolitan Scheme" with an exceedingly ingenious plan mapped out by Miss Octavia Hill in her little work entitled "Homes of the London Poor." This intelligent and philanthropic lady proposes that every application for outdoor relief shall come before a Central Board of Guardians in London, and there be considered side by side with three reports—one from a salaried Government inspector, a second from a voluntary visitor who shall inquire into the circumstances of each particular case, and a third in the form of a testimonial from the charitable societies in the district where the pauper has previously resided.

I am inclined to believe that we shall reach the solution of this difficult problem in working along such lines as those laid down by Miss Octavia Hill.

(e) To prevent the spread of contagious diseases I am very strongly in favour of the State regulation of vice.

The argument against the Contagious Diseases Acts appears to me to be founded on a confusion between the proximate and the ultimate objects of law. We are undoubtedly bound to look forward to the final extirpation of evil; but it is equally our duty to avail ourselves of the means of repressing it, and to endeavour to restrain what we cannot immediately hope to cure. I fail entirely to see any validity in the grounds on which the objection to this *de facto* recognition of vice is made to rest, and see nothing to admire in the sickly sentimentalism which would proscribe the vicious and unfortunate from certain localities, knowing very well all the while that the expelled demon had merely changed his quarters, and that the second possession was worse than the first.

I have now, in the last place, to deal with the radical cures for the over-concentration of the masses in great cities; and these, I think, may be arranged under three heads:—

- I. The development of the colonial system.

II. The encouragement of emigration.

III. The reform in the Land Laws.

I. Glorious as the colonial history of Europe has been, we may yet, I believe, discover many serious blunders which in the future we shall do well to avoid.

(a) Enormous tracts of land should never be granted to single individuals. This error proved the deathblow of the early enterprises of Raleigh and his contemporaries, and was caused by the fact that Government took very little interest in the matter and gave most liberally to the most shameless and importunate suitor.

(b) Neither Government nor the colonist need expect immediate returns.

(c) Inducements to emigrate should only be offered to well-behaved and industrious men.

The breach of this rule occurs with ludicrous frequency in the history of England. The colonies seem to have been regarded as a vast pool of Bethsaida to which the halt, the blind, the lame, and the feeble, mentally, morally, and physically, might be borne with advantage to themselves, to the home which they had left, and to the country of their adoption. The colonial system ought not to be destroyed like the fatted calf in order that a number of idle and dissolute prodigals may make merry and be glad.

(d) The object of Government in developing the colonial system ought to be to relieve the pressure of population at home where it is most severe.

(e) Mr. Wakefield's scheme of colonization ought always to be adopted, which aims at introducing the division of labour as silently and effectually as possible.

II. I have separated the encouragement of emigration from the development of the colonial system, not because of any inherent difference between them, but because the few remarks which I wish to make under this head will be more intelligible when standing alone.

The *obstacles* to emigration are chiefly mental, and include all the pleasant associations and feelings which bind men in general and Scotchmen in particular to their native land. Unskilled workmen, too, are the class to whom emigration would be the greatest blessing, both because they are worst paid at home and most needed abroad. But these very classes will not emigrate, partly on account of their lethargy and indolence, and partly from a vague fear of the dangers of the sea and a slavish prejudice against any country but their own. To the average Briton, in Mr. Hallam's words, a foreigner has always been the synonym for an enemy. The great *danger* of emigration is that it may go too far; but this danger may be averted by industrial co-operation, by joint-stock associations and partnerships, by anything, in short, which tends to promote harmony between the labourer and the capitalist.

A carefully-regulated system of emigration removes a surplus

population from districts where it cannot, to large tracts of land where it can, find abundant employment and remuneration. Our own cheap food, besides, is chiefly supplied by the very nations which our emigrants develop. And in the third place, international relations are confirmed and international commerce secured by the links which bind the mother country to the colonies where her children have settled. A judicious regulation of emigration is very desirable at the present day, and the peaceful relations of most great countries and the gradual removal of protective duties bring it quite within the range of practical politics.

III. It would be very easy to reiterate all that I have already said on the subject of agricultural depression in an earlier part of this essay, and taking up each of the elements in detail, to indicate the means by which it may be counteracted; but I think that we can find a more excellent way. There is, as it seems to me, one general principle lying at the root of the whole question which may be stated in the following form.

The object of all reform in the laws and customs regulating the possession, inheritance, and acquisition of land should be to give the mass of the population an interest in the country; and this is to be effected by facilitating the transfer of land, by bringing it readily into the market, and by reducing it more and more to the level of every other commodity.

This principle pledges us to no violent reform; it commits us to no definite line of action; it prescribes no "ways and means," and in all these particulars it is in perfect harmony with the character of political economy as a science. In order, however, to accomplish the general object which I have stated, I venture with all diffidence to offer the following suggestions:—

(a) The total abolition of long leases and the laws of primogeniture and entail.

Our leases have two great faults, they are too long and they are too minute. They take no account of the fact that a hundred circumstances may arise to modify the conditions under which they were signed. They offer no relief to the farmer, and do not permit him to relieve himself.

To my mind the argument usually adduced in favour of the law of entail, that it prevents the dispersion of large estates, is its strongest condemnation. For what does the maintenance of such estates imply but the concentration of power and property in the hands of a few persons who are either unable or unwilling to use it well? Entail of property means degradation of property. It is a curse to the community, to the proprietor, to the tenant, and to the land. Break the law of entail, and mark the effects which follow. The well-disposed proprietor is now for the first time master of his land; self-interest will lead, and law will not forbid, him to improve it. He will employ capable tenants and do his utmost by courtesy and generosity to retain them. The needy

landlord, on the other hand, will part with his estates to the man who can afford to pay for them. Thus his property will pass from the hands of a nominal owner to those of a wealthy capitalist who is able to develop its resources by highly-rewarded and therefore skilful labour. There are three chief pleas in favour of the law of entail to none of which I can assign great importance. We are told that it secures the quick resettling of estates on the death of the owner, and thereby prevents litigation; we are told, in the second place, that we have no substitute to place in its room; and in the third place, that with the dispersion of large estates would disappear the landed influence, the "agricultural interest" of England. The first argument considers "the few" and not "the many," and the litigation occasionally prevented by the law of entail is light in the balance when weighed with the injury which it almost always inflicts. To the second argument I reply that the law of entail acts as a barrier to the free sale of land, the distribution of which would be naturally regulated by demand and supply on the abolition of the monopoly. The third argument is more subtle, and appeals to the passions and prejudices of Englishmen; but it is fallacious after all. The dispersion of large estates would not *necessarily* follow the abolition of entails, and even if such a dispersion did occur, it might not be undesirable. The "landed influence" of England has already been crippled by the Ballot Act, and is destined still further to decay unless fostered by some agency more potent than the law of entail. It is too much, besides, that this "agricultural interest" should always be brought forward like a man of straw to disguise some real though hidden object, and prevent great abuses from being reformed.

The latest and, so far as I know, the only distinguished champions of the law of primogeniture are two men very different in disposition, character, and ability—Samuel Johnson and Thomas Chalmers.

"It is enough," thundered the great literary dictator, "to make one fool in a family," and probably Boswell and Mrs. Thrale were silenced by the ingenuity, if not convinced by the logic, of the argument.

Dr. Chalmers' defence of primogeniture, if not equally epigrammatic, is assuredly more reasonable. Primogeniture, we are told, prevents the dispersion of large estates and the *consequent* minute subdivision of land. Elder sons are usually better qualified than younger to take charge of a fine property. It is no hardship to deprive the latter of what they have never been trained to expect, while the sight of their brother's opulence stimulates them to active exertion and self-denial. The whole train of reasoning seems to proceed on a string of assumptions each more unwarranted than its predecessor. The dispersion of large estates is by no means implied in the abolition of primogeniture. The younger sons would not necessarily settle down like locusts on the land to consume its pro-

duce and waste its resources. They would be far more likely, I should say, to take in money value the portion that fell to them, and seek fortune and prosperity in some far country where agricultural depression was as yet unknown. Again, although such a dispersion did take place, it need not be too minute. Even in France, for instance, where the Code Napoleon enforces direct division of land, the process of disintegration has been very gradual. Finally, the sight of the luxury and opulence of a brother whose only claim to their exclusive enjoyment rested on the accident of birth might make the younger members of a family jealous and discontented, but could never incite them to industry or labour.

(b) Along with the laws of primogeniture and entail would necessarily go the obscure and expensive titles which embarrass the conveyance and purchase of land.

The effect of this reform would be to enable a great number of small farmers, traders, and shopkeepers to become buyers of land, and thus to create an "agricultural interest" upon a wider and sounder basis than that which it destroyed.

(c) The security of the capital which the tenant has invested in moveable or immoveable improvements must in some way or other be guaranteed. The solution of this difficulty will, I believe, ultimately be found neither in the right on the part of the tenant to sell his improvements in default of compensation, as Dr. Hunter suggested, nor in the appointment of such a Land Commission as we have in Ireland, but in the choice of equal numbers of arbitrators by the landlord and by the tenant, to whom all disputes will be referred and by whom they will be settled finally and without appeal.

(d) Greater freedom must be granted to the tenant in the cultivation of the soil and in the disposal of its produce. This proposition implies in the first place liberty of cropping, in the second place shorter and simpler leases, and in the third place the right to sell all or nearly all the farm produce.

(e) The laws of distress, fixtures, and hypothec should be finally repealed and never in any form renewed, and the Game Laws should be placed on a still sounder basis than that upon which at present they rest. It will be at once more equitable and more politic in the landlord to treat his tenant in the matter of game as handsomely as possible. More equitable, because very great injury is often done to the farmer's crops by the birds he is not permitted to destroy; and more politic, because sly poaching is so easy to perpetrate and so impossible to detect.

(f) We require a better representation of tenant-farmers in Parliament; we need personal and persistent effort on their behalf in the House of Commons. There are two indispensable elements of success, viz. we must avail ourselves partly of individual and partly of organized exertion and influence; we must have some man, half enthusiast and half fanatic, to mount the hobby, and other men of ability, perseverance, and spirit to help him to ride it.

There are two further remarks which I wish to make, one with special reference to the Government, the other applying equally to us all.

The mere reformation of the Land Laws is not enough. Supposing that the whole question were satisfactorily settled, and that the dangers of over-concentration had passed away, what guarantee have we against their recurrence unless we provide some means of teaching the people that the possession of "broad acres" is valueless without the capacity to enjoy it or the sense to use it well? But the evil may take a still higher form. By the very genius of our constitution every proprietor is an elector. The problem which lies before us is this. We are throwing open to a class numerically the greatest in the kingdom the avenues of political power and the right to exercise a tremendous influence in the future. Can we tell how that power will be used, and in what direction and for what purposes that influence will be exerted? Here is a knot for the ingenuity of our statesmen to untie. The *obsides dent civitati* of antiquity may probably afford the clue. Give the people a *stake* in the constitution; let them become national creditors; put every facility for investment and saving within their reach. Give them an *interest* in the constitution; let them understand our national history; let them see that our ideas of government are not the crude fancies of children (for it is here alone that

"By degrees to fulness wrought
The strength of some diffusive thought
Hath time and space to work and spread"),

that our freedom is no thing of yesterday, and that our constitution did not spring ready-made into existence, like Minerva from the brain of Jupiter, but was slowly developed from infancy and childhood to the "full stature of the perfect man."

Finally, in view of the whole question there is an obligation which rests specially on ourselves, and that is to rouse public opinion on the matter steadily and consistently. We need expect no special Divine interposition, *nec deus intersit nisi dignus vindice nodus*, and yet no one who has studied the history of his country can regard private personal exertion as useless or certain to fail. To do him justice, the Englishman, in a higher and better sense than Mr. Bumble, "only wants a little rousing," and seldom turns a deaf ear to the appeal of philanthropy or patriotism.

But successfully or unsuccessfully, we must endeavour to awaken in our fellow-countrymen some interest in a very difficult problem which we shall not always be able to ignore. At present it cries eagerly aloud for solution, but if we are too dull to hear or too indolent to regard the cry, it will most assuredly speak to us one day in a voice which cannot be mistaken and in language which it is impossible to misunderstand.

HENRY ERSKINE.¹

DISTINGUISHED Scottish lawyers have rarely formed the subjects of biographies. No Campbell has arisen as yet to do for the Scottish what he has done for the English Bench. Colonel Fergusson's volume, indeed, suggests the difficulties which any one attempting such a work has to encounter. The sphere of even the most brilliant member of the Northern Bar is, after all, but a limited one. His entrance into the great world depends upon his ability to secure a seat in Parliament, and when there, he is usually hampered by his official position. Moreover, the lawyer's influence, like that of the actor, is chiefly felt during his own lifetime. His speeches have not been preserved, and if they had, few would care to read them. When one can no longer hear the impressive voice in which they were delivered, nor watch the effect which they made upon judge or jury, it is impossible to awaken much interest in the orator.

Colonel Fergusson has indeed brought forth a somewhat bulky volume. But its contents are by no means solely devoted to Henry Erskine. His brothers receive almost an equal share of attention, his aunts and his cousins are not overlooked, and the biographer has the most intensely Scottish conception of what constitutes a cousin. In fact this book, while we read it, suggested to us the scene of a large crowd through which at intervals Henry Erskine might be observed wending his way. The incidents of his life appear like those of the narrative in such works as Sterne's "Tristram Shandy"—we pick them up from time to time amidst a mass of other details.

Many of our readers may doubtless regret that the life of Henry Erskine was not undertaken by a lawyer. Although Erskine was far from being a mere lawyer, and indeed contributed nothing to the literature of the profession, his memory will ever be peculiarly cherished by members of the Scottish Bar; and had one of this body undertaken the work, it is possible that there might have been greater professional details. We say possible, because, on the other hand, Colonel Fergusson may really have told us all there is to tell. Erskine, although long at the Bar, and engaged in an extensive practice, had very little of an official career, and never reached the Bench. The men who can remember him as he paced the floor of the Parliament Hall and addressed the "Auld Fifteen," or the juries in the Justiciary Court, have long since departed. Erskine's humour has done more than his law to perpetuate his name, and all the stories we ever heard attributed to him have been duly chronicled in the volume before us. As to his style as a pleader, can we wish for any better description than that conveyed to us in

¹ The Honourable Henry Erskine, Lord Advocate for Scotland; with Notices of certain of his Kinsfolk and of his Time. By Lieut.-Colonel A. Fergusson. Blackwood & Sons, Edinburgh and London, 1882.

these spirited lines of Burns, written after witnessing a contest between him and the Lord Advocate of the day, Mr. Hays Campbell?—

“ Collected Harry stood a wee,
Then opened out his arm, man;
His Lordship sat, wi’ ruefu’ ee,
And eyed the gathering storm, man:
Like wind-driven hail, it did assail,
Or torrents owre a linn, man;
The *Bench* sae wise, lift up their eyes,
Half-waukened wi’ the din, man.”

From Colonel Fergusson’s preface we learn the sad fact that a collection of materials for a biography made by Erskine himself has apparently been lost. His son, however, the late Earl of Buchan, left a MS. volume relating to his father, extracts from which form perhaps the most valuable portion of the book under review. “Lord Jeffrey,” we are told, “would fain have seen a life of his friend and patron put in shape; and on one occasion when the late Lord Buchan visited him at Craigcrook was urgent that the matter should be taken in hand, promising that he himself would render all the assistance in his power.” Another eminent man, and one the memory of whose friendship we fondly treasure, was also deeply interested in this project. We refer to the venerable David Laing. “He,” says Colonel Fergusson, “would listen to no argument against it. Had he been forty years younger, he said, he would have undertaken the matter himself; and was very urgent that it should be taken in hand by the present writer.” All that Jeffrey did do was to write a character of his illustrious friend, which was published along with an account of the Edinburgh dinner to Lord Erskine in 1820. With this and the references to Erskine in Cockburn’s immortal works we must rest content, although we fain would have had more from those who were so peculiarly qualified to give it.

The picture which Colonel Fergusson presents to us is that of a very perfect Scottish gentleman honourably pursuing a profession which has for centuries taken the lead in this country, of one who in a coarse and corrupt age was refined and unsullied, to whom the independence of the Bar was very dear, and who refused high and lucrative office rather than appear to surrender the political principles to which he was conscientiously attached.

He was described by one speaker in the House of Lords as the “best-beloved man in Scotland.” The mere fact that in 1785 he, a Whig in politics, should have been elected Dean of the Faculty, and should have held that office for ten years, speaks volumes for the attractions of his character. Let those who are inclined to carp at lawyers, and repeat the silly and worn-out calumnies against the profession, study the life of Henry Erskine.

Erskine flourished during the most brilliant period in the history of his native town. A biography of Erskine necessarily involves

a description of old Edinburgh life and manners, and in this Colonel Fergusson has been fairly successful. Much which he tells us will be found elsewhere, but he has thrown his materials pleasantly together. We can forgive the somewhat irrelevant manner in which one name or event introduces another, because to no one who loves old-fashioned Scotland and things Scottish will the details prove wearisome. To the reader who lives wholly in the present this book will be tiresome enough. He cares nothing about the gaieties in Old Assembly Close, or the festivities of the Poker Club with its dinners at one shilling a head. A society which could flourish in Halkerston's Wynd or Gray's Close, whose members were invited to a dish of tea at four o'clock, and esteemed a dinner in the ultra-fashionable realm of George Square one of the events of life, may seem strange and perhaps utterly contemptible. Nevertheless in those days Edinburgh really had an aristocracy, not merely of rank, but of wit and talent. To this aristocracy Erskine had every title to belong. He was, in fact, the *beau ideal* of an Edinburgh gentleman entering into every amusement of the place. The Royal Company of Archers, the Honourable Company of Golfers, the Society of Antiquaries can all point to his distinguished name in their lists of membership.

Henry, or, as his friends loved to call him, Harry Erskine, second son of the tenth Earl of Buchan and his wife, Agnes Stewart, was born in Gray's Close, Edinburgh, in November 1746. It is unnecessary to state that the family of Erskine is "one of very considerable antiquity" in Scotland. For full information concerning it, or at least the Buchan branch of it, we may refer our readers to Colonel Fergusson, in whose eyes all which relates to the subject appears sacred. By means of the pedigree contained in his volume the curious in these matters can trace back the descent of Erskine to St. Louis of France, whose descendant Lady Marie Stewart married the seventh Earl of Mar. We are more concerned to observe the legal element in his ancestry. At a dinner given to him in 1820, at Edinburgh, Thomas Erskine, Henry's younger brother, spoke as follows: "Finding since my arrival that I am come lineally and directly from so many great lawyers in Scotland—from such men as the Viscount Stair, Sir Thomas Hope, and Sir James Stewart—I am forced to see that I owe my success entirely to the breed, and not to any merit in myself."

The maternal grandmother of the Erskines, Lady Stewart, was a daughter of Sir Hew Dalrymple of North Berwick, and granddaughter of the great author of the Institutes. Their descent from Sir Thomas Hope arose from the marriage of David, the second Lord Cardross (their great-great-grandfather), with Anne Hope, daughter of this distinguished lawyer. Of his great-grandfather, Sir James Stewart, Thomas Erskine has said that "he did everything an honest man could do to be hanged under James II., and was afterwards King's Advocate under King William." Sir

James was the author of the legal portion of "Naphtali," which of course stamps him as a Covenanter of the extreme school, and has caused him to be abused by Mark Napier and even Macaulay. To lawyers he is better known by his "Solutions of Nisbet of Dirleton's Doubts." Wodrow says of him, "He was wonderful in prayer and mighty in the Scriptures, and wonderfully seen in them beyond any man almost ever I conversed with."

But Henry Erskine had a still more famous ancestor. His grandmother, Frances Fairfax, wife of the ninth Earl of Buchan, was the granddaughter of the celebrated Sir Thomas Browne, author of "Religio Medici," and indeed the Buchan family appear to be the only descendants of this remarkable man now in existence.

Whether it is to be attributed to "the breed" or not, there can be no doubt of the fact that the family of the tenth Earl of Buchan and his wife, Agnes Stewart, were remarkable for their talents. Colonel Fergusson has preserved some interesting memorials of the elder daughter, Lady Anne Agnes Erskine, the friend and assistant of Lady Huntingdon, and after her death the leader of the sect which she had founded. In Lady Anne may perhaps be traced her ancestor's religious zeal and power in prayer and the Scriptures. Her brothers appear to have been more devoted to things temporal. The eldest, David, who afterwards became eleventh Earl of Buchan, had undoubted ability, affected, however, by a far from offensive eccentricity. Opinions concerning him have widely differed. While some were inclined to rate his abilities as higher than those of his brothers, Sir Walter Scott called him a "cheap Mæcenas" and a "trumpety body." But he had bothered Scott by submitting a scheme for his funeral at Dryburgh. That he had a great disposition to patronize, and a most exalted idea of his own importance, there can be no doubt. Earls are apt, however, to be spoiled, especially in such a society as that of Edinburgh, where they are so scarce. He might have distinguished himself had he been obliged to follow a profession. As it was, he had free scope for his eccentricities, and by them is his memory preserved to us.

Of Thomas Erskine, the Chancellor, it is unnecessary to say anything here. Of all the men who have gone from Scotland to the English Bar, and risen to eminence there, his career is the most remarkable. When in 1806 Henry Erskine met at a levee George III., the latter remarked to him, "Not so rich as Tom, eh? not so rich as Tom?"

"Your Majesty," was the reply, "will please to remember my brother is playing at the guinea-table, and I at the shilling one."

One result of playing at the guinea-table has been to secure him a biographer in John Campbell, who may certainly have been well qualified to write of lawyers, but falls far short of the reverence with which Colonel Fergusson treats the Erskine family. Campbell has dwelt with perhaps a malicious emphasis upon the poverty of the Buchan race, and endowed them with half-ruined castles and

squalid upper flats. Colonel Fergusson has thought it necessary to repudiate such a representation. But if there is no disgrace in honest poverty, the Erskines have no cause to be ashamed; for they lost land and gear in a good cause, that of civil and religious liberty.

Henry Erskine seems to have made almost a complete round of the Scottish universities. Beginning with St. Andrews, where his family for a period resided, and where he matriculated in 1760, he entered at Glasgow in 1764, and finally studied law in Edinburgh. Although thus entirely educated in Scotland, and at a period when the Scottish peculiarities of speech, even amongst the upper ranks, were so pronounced, it is said that Erskine's diction as a speaker "was of such purity and elegance as to delight all hearers, whether English or Scotch." Lord Brougham remarks that "there was no trace of provincial accent." In this he differed from Jeffrey, who by going to Oxford "tint his Scotch, but fand nae English." But Erskine had the benefit of a musical ear.

He seems to have inclined at first towards the English Church as a profession, and began law studies, his son tells us, reluctantly. He was called to the Bar in 1768. "At the time of his first appearance at the Bar," says his biographer, "he was considered to be handsome in no common degree. His graceful figure, well-defined features, prominent nose, well-cut forehead, mouth somewhat large, clear blue eyes, and masses of fair hair undisturbed by any wig; all these attractive gifts when added to the charm of his brilliant eloquence were, it will readily be understood, more than sufficient to attract large audiences." Cockburn, who knew him in the days of his seniority, speaks of a "tall and rather slender figure, a face sparkling with vivacity, a clear sweet voice, and a general appearance of elegance which gave him a striking and pleasing appearance."

Erskine easily found scope for his eloquence, not only in the Parliament House, but within the more sacred and at the same time more lively precincts of the Assembly. He was a strong Presbyterian and a highflyer. The distinction between Church parties then existing was, we suspect, fully more a political than a theological one. He had to fight the moderates, and was wont to say that running down *Hill* was easy and pleasant work. It was natural that in course of time he should present himself as a candidate for the procuratorship, and also natural that the Tory and "moderate" Robertson, son of the Principal, should be preferred to that office. Erskine is credited by his biographer with having introduced innovations in the style of Bar-speaking. Oratory of any sort seemed probably at that period an innovation, and a pure accent must have been sufficiently startling to men of the Braxfield and Eskgrove type. To the manner in which he made his humour serve the interests of his clients Jeffrey has referred in his character of Erskine. "All his wit was argument, and each of his delightful illustrations a material step in his reasoning. To himself it seemed always as if they were recommended rather for their

use than their beauty. And unquestionably they often enabled him to state a fine argument or a nice distinction not only in a more striking and pleasing way, but actually with greater precision than could have been attained by the severer forms of reasoning. In this extraordinary talent, as well as in the charming facility of his eloquence, and the constant radiance of good-humour and gaiety which encircled his manner in debate, he had no rival in his own times." We need not wonder that parties were made up to attend the Courts when he was pleading, or that, when on a certain occasion he told the judges that he should be brief, one of their number remarked, "Hoots, Maister Harry, dinna be brief, dinna be brief."

His success seems to have been early established. "He makes more," writes a female relative, the wife of Baron Mure, "of his business than ever any lawyer did—above £2700 a year for two years back." From the numerous trials in which Erskine must have been engaged, Colonel Fergusson selects two for notice. He was counsel for the once celebrated Deacon Brodie, convicted of housebreaking, and executed in October 1788. Brodie, like another Edinburgh character of earlier date, Major Weir, appears to have imposed considerably upon his fellow-townsmen and secured for himself a place in the Town Council. In one respect, however, he differed from the Major, for he was a jovial man, a frequenter of the cockpit, and sang a good song. Curious stories are related of his housebreaking exploits. His trade of a cabinetmaker doubtless made him familiar with the contents of many a house. He was tried for a robbery of the Excise Office. After commission of the offence he had managed to escape, but was arrested in Holland and brought back to Edinburgh. Among his counsel at the trial was Charles Hay, afterwards Lord Newton, immortalized by Ræburn. The "king's evidence" was too much for the unfortunate deacon, and in spite of an eloquent speech from Erskine, who rose at three in the morning to deliver it, the jury returned a verdict of guilty. Brodie seems to have been quite remarkable for coolness both before and after his conviction, and it is said relied upon the skill of a French quack who undertook to restore him to life. But "the arrangements for Brodie's preservation were, it is believed, mismanaged, and the working of the improved gallows, perfected by his own ingenious contrivances, was only too true, and defied all attempts at resuscitation."

Brodie, we may mention, is suspected of having stolen the mace of the Edinburgh University, an ancient relic found in the tomb of Bishop Kennedy. The Town Council did their best to atone for this act by substituting a new article in place of the one which had disappeared.

There is no record of Erskine's speech on the occasion of this trial. He assured Creech the bookseller, who published an account, and who had formed one of the jury, that there had not been a syllable in writing.

The trial of Macdonald of Glengarry for shooting Lieutenant Macleod of the 42nd Highlanders was another of Erskine's celebrated cases. Glengarry was a distinguished Highland chief, and is said to have suggested the character of Fergus MacIvor to Sir Walter Scott. The unfortunate affair which brought about his trial arose out of a quarrel at an Inverness ball, leading almost naturally in those days to a duel. Macleod seems to have been a foolish boy, whose chief consolation when he lay dying was that he had stood Glengarry's fire like a man. The main point in Glengarry's favour was his attempt at a compromise previous to meeting his adversary. Of this Erskine in a fine speech of three hours' duration made the most, and he secured a verdict of *not guilty*. "There was a great dinner," says Colonel Fergusson, "held by Glengarry's friends at Oman's Hotel in honour of his acquittal, to which Mr. Erskine was bidden, but his admiration of the part played by his client in the late tragedy was not sufficiently strong to admit of his being present."

His biographer has very properly dwelt upon the readiness with which Erskine went to the assistance of the poor and humble. There is something romantic in the way in which he undertook the cause of the Baptist minister M'Arthur pressganged while conducting public worship by the sea-shore at Collintraigh Ferry. "Ye dinna ken what ye're saying, maister," was the reply of one when advised against litigation with a rich adversary upon the ground of the expense likely to be entailed; "there's no a puir man in a' Scotland need want a friend or fear an enemy sae lang as Hairy Erskine lives." It was in the course of a conversation with a lowly client that the following flash of his own peculiar humour occurred. A workman who had received in change a Spanish dollar sought the Dean of Faculty's advice as to the best mode of recovering the balance which he still considered due. These dollars were at that time in circulation in this country, and although only worth something under 4s. 6d., they were legal tender for 5s., being stamped with the English king's head in addition to that of his Spanish majesty. After doing his best to dissuade the man from taking any steps in the matter, he remarked, looking at the coin, "One thing I will say, I never could have believed that two such respectable persons as these would have *laid their heads together* to do a poor man out of sixpence." The chivalry of his disposition well fitted him for the post of Dean.

Erskine's experience of official life was not great. He had adhered to the Whig principles of his family, and he lived in the reign of George III. These two facts are almost sufficient to explain why he held the office of Lord Advocate but for so short a time, and never reached the dignities of the Bench. The public and his own brethren proclaimed him the first advocate of his day, but he had cast in his lot with the Opposition, and had for the most part to remain in the shade accordingly. His opinions probably

stood in the way of his obtaining even the inferior post of counsel or procurator to the Church. But his popularity with the clergy seems to have been so great that he lost this appointment (in a contest, as already mentioned, with Robertson, the son of the great Principal) by a narrow majority.

When, however, in the spring of 1783 the short-lived coalition ministry of Fox and North was formed, Erskine was naturally appointed Lord Advocate, superseding in that office Pitt's friend Dundas. It is gratifying to find the retiring official writing to him thus: "You will not expect from me to say that I approve of the change, but you may believe me to be very cordial and sincere in wishing you all health and happiness to enjoy it. Perhaps in the first outset of a new line of business you may sometimes wish to know what your predecessors were in use to do; if any such occasion occurs to you, you will find me at all times very ready to aid you with any suggestions of mine which you think worthy of receiving."

Colonel Fergusson relates the following, which savours of Parliament House tradition:—

On the day when the appointment changed hands an interview took place between the new and the old Lord Advocate in the Parliament House. Erskine observing that Dundas had lost no time in divesting himself of the robe of office, having already resumed the ordinary stuff gown usually worn by advocates, said gaily that he supposed he "ought to leave off talking and go and order his *silk* gown."

"It is hardly worth while," said Dundas drily, "for the time you will want it, you had better borrow mine."

Erskine's reply was happy and characteristic. "From the readiness with which you make the offer, Mr. Dundas, I have no doubt that the gown is a gown made to fit *any* party; but however short my time in my office may be, it shall never be said of Henry Erskine that he adopted the *abandoned habits* of his predecessor."

After a short term of office the gown had to be cast aside again for one of stuff. "My Lord," he said to his successor, subsequently Lord President Campbell, "you must take nothing off it, for I'll soon need it again." Mr. Campbell replied, "It will be *bare* enough, Harry, before you get it again." He was right. A long term of office lay before the Tories, and not until twenty years had elapsed did Erskine wear the silken robes of the Lord Advocate. To be coldly treated by the King secured in those days the patronage of the Prince. Erskine became Advocate and State Counsellor to the latter, offices which, we imagine, brought but slight pay and honour to the holder. He became Lord Advocate for the second time in 1806 under the ministry of "All the Talents," and was chosen member of Parliament for a group of Scottish burghs, and elected after the extraordinary fashion of unreformed Scotland. The following curious custom is referred to in a letter by his agent preserved by Colonel Fergusson: "It seems it has been the constant practice for the sitting member to send an English newspaper to each burgh in

the district, with the exception of *Lauder*, to which Mr. B—— informed me that it had been in use to send the *Courant*. This is an expense I could not have dreamed of, but so much is it understood that James Dalrymple desired that instead of the *Courier* the *Globe* should be sent to *North Berwick*. The delegates for *Haddington*, *Dunbar*, and *Jedburgh* made choice of the *Star*."

Colonel Fergusson takes exception to Lord Campbell's assertion that Erskine "never opened his mouth in the House of Commons, so that the oft-debated question how he was qualified to succeed there remained unsolved." On the contrary, the gallant biographer has produced quotations from sundry of his speeches. There seems indeed no evidence that he went beyond necessary Scottish business or took part in the discussions of what would now be called imperial measures. It may be mentioned that amongst other duties which fell to him to perform was the introduction and guidance of a bill for the Bell Rock Lighthouse, carried successfully through Parliament in spite of considerable opposition.

But he has, moreover, a claim to be ranked with legal reformers. The first of a series of bills introduced with the object of rendering our legal machinery more efficient dates from Erskine's term of office. While he was Advocate preparations were made for sweeping away the "Auld Fifteen," whom he had so often delighted with his wit and influenced by his eloquence. The only prose publication which it is said can be traced to him is a pamphlet published in 1807 on the "Expediency of Reform in the Court of Session in Scotland." It was, however, left to his successor to carry out the new judicial arrangements. The fall of the Whig ministry sent Erskine for the second time from office, and the measure of reform which actually became law was one for which Lord Chancellor Eldon was responsible.

Henry Erskine became Dean of Faculty in 1785, "an honour" which, as his biographer truly remarks, "is held in the highest estimation by any lawyer; as well it may be, for few distinctions can be considered more valuable than one such as this is, conferred on a man by the voice of his fellows." Political considerations should not, and as a rule do not determine the choice, and although there is an annual election to the office, this is as a rule a mere matter of form. And yet it was in the case of such a man as Henry Erskine that the majority of the Bar chose to set aside the traditions of their own profession. After having held the honourable post for ten years, he was by an adverse vote driven from it solely because of his political actings. He seems to have exhibited at a time when men went to extremes in politics much moderation. He retained his senses during the French Revolution, and escaped alike from that extravagant dread of popular movements and that equally extravagant faith in them. In his opinion the time was an ill-chosen one for political agitation. Writing in 1792 to Sir Gilbert Elliot, and referring to the overthrow of despotism

in the sister kingdom, he says, "I am perfectly certain that it has excited in the minds of many men in this island ideas on the subject of government highly hostile to our happy constitution, and which if not repressed by the firmness or moderated by the address of its real friends may lead to consequences of the most dangerous nature. At such a time, therefore, that general complaints of the defects of the British constitution should have been brought forward from so respectable a quarter I most sincerely regret." These are surely the sentiments of a moderate man. But although he did not think the season opportune for promoting reform, he was quite prepared to exert his influence in checking encroachments upon the rights already possessed by the public. In 1795 he attended a meeting convened in Edinburgh to protest against the "Seditious Writings Bill," and he there moved certain resolutions. The right to agitate either for or against a measure pending in Parliament is now so fully recognised that it is difficult for us to realize how its exercise should ever have brought discredit upon any one. But it was different in those days, and there was then at the Bar a fussy clique in whose opinion Erskine's conduct called for condemnation. Possibly they had long wished to see a Tory Dean in office, and gladly welcomed any excuse for turning out one holding politics not of the proper colour. Eight gentlemen (the majority of whom ultimately occupied the Bench) took upon them to issue a circular letter to their brethren of the Faculty, at the same time sending a copy of it to the offender himself. In this letter they seek to alarm the minds of these brethren by suggesting the representative character of the office which Erskine held. "It will, sir," they wrote, "be obvious to you that sentiments and principles of the members of the Faculty relative to those great national and constitutional interests which, unhappily, have for some years been so much the subjects of anxiety to all loyal citizens, must in a great measure be judged of from the conduct of the person who, by their annual and voluntary choice, is raised to the high station of head of the Bar and of their society." After calling attention to what Erskine had done, they conclude by suggesting a more suitable candidate for next election in the shape of the Lord Advocate. Erskine took care to circulate on his part his reply to these gentlemen. His answer is a spirited one, and is given along with the rest of the correspondence in the appendix to Colonel Fergusson's volume. "To the Faculty," he writes, "my character, my conduct as a gentleman, as a brother, are known. If a majority of your number, departing from the uniform sentiments of our body to exclude political discussions and considerations from amongst us, shall withdraw from me their suffrages at the ensuing election, I may regret; but I am proud to say the *cause* of their doing so I shall ever reckon my highest honour." After seeking to justify his conduct by a reference to the actions of his ancestors, he concludes thus: "If such conduct resulting from

such motives unfits me, *in your opinion*, any longer to fill the chair of the Faculty, you will act as you see fit. If such shall be the opinion of the majority of my brethren, if they are determined that there shall no longer be amongst us freedom of political opinions, if party prejudice and violence are to usurp the place of moderation, of personal respect, and of private friendship, I can only say that such was not the Faculty of Advocates when I was first honoured with the situation I now enjoy. To have received it was a high honour. I shall consider it as still a higher honour to lay it down." In the reply of the council of eight there is an almost absurdly clear illustration of the fallacy known as begging the question. After complaining of his misconception "as if the matter at issue between us were a matter of *politics* in the vulgar sense of the word," they go on to explain that it is no such mean question, but that "the interest now at stake is nothing less than this, whether the happy government and constitution of these realms shall stand or fall." Well might Erskine call in question their right when addressing the Faculty "to rest the safety of the constitution and the existence of the State on the political views of the administration to which they are attached."

The result of all this is thus recorded: "Tuesday, 12th January [1796]. Came on the election of the Dean of the Faculty of Advocates. The candidates were the Right Hon. Robert Dundas of Arniston, his Majesty's Advocate for Scotland, and the Hon. Henry Erskine of Newhall, the former Dean, when the Advocate was elected by a majority of 85, there having voted for his Lordship 123, for Mr. Erskine 38."

Amongst the younger members of the Bar who abstained from voting was Francis Jeffrey.

Cockburn has said, "This dismissal was perfectly natural at a time when all intemperance was natural. But it was the Faculty of Advocates alone that suffered."

It is obvious that a wider question was involved than the character of Henry Erskine. The independence of the Scottish Bar stood in some danger when the exercise of his political rights by a member of it led to this act of condemnation. For that independence Henry Erskine fought bravely and well.

It is to this election of Dean that Burns refers when he writes—

"In your heretic sins may you live and die,
Ye heretic 'Eight-and-thirty;
But accept, ye sublime majority,
My congratulations hearty.
With your honours and a certain king,
In your servants this is striking—
The more incapacity they bring,
The more they're to your liking."

Dundas, Erskine's successful rival, is treated unfairly in these lines, and possibly the poet was actuated by personal feelings in the

matter. But there was much to excuse bitter writing, for many severe things had been said on the other side.

There were two periods in Erskine's life at which it seemed probable that he would be elevated to the Bench. In 1804 the Justice-Clerkship was vacant by the resignation of Lord Eskgrove. The post apparently was offered (as is usual) to the Lord Advocate of the day, Charles Hope, one of the men who had nine years previously opposed the re-election of Erskine. But Lord Buchan tells us that Hope came to his father and informed him that "he need only signify his willingness to accept and he would immediately have the office." Erskine declined, through a fear lest his acceptance might imply a departure from his principles and separation from his party. Lord Cockburn corroborates this incident on the authority of Hope. It is satisfactory to have such grounds for believing a story creditable alike to both of these eminent lawyers, whose political differences did not hinder their personal friendship.

It is not so easy to discover why Erskine was not appointed to succeed Lord President Blair in 1811. He had by that time twice held the office of Lord Advocate, and his claims were strongly urged upon the Prince by their mutual friend Adam. Colonel Fergusson gives us various letters bearing upon the subject, but the rejection of Erskine is not explained. Probably politics had a great deal to do with it. The Prince of Wales' attachment to the Whigs sprang out of his opposition to his father, an opposition which had nothing to call it forth after the Regency began. The ex-Dean of Faculty could not fail to be identified with his brother, and may have suffered at the hands of his enemies. Erskine, we are told, "used to recall an incident that struck him at the time as very characteristic of the underhand scheming which was so rife at this period. One morning he met — at the Parliament House and asked if he had any news from London. 'Excellent,' was the reply, 'we shall all be sent for in a short time,' and the speaker threw down a letter for Mr. Erskine to read; but two letters received that morning had been misplaced in their franked covers. Mr. Erskine, reading the one not intended for his perusal, came upon the expression, 'We must at any rate *get rid of the Erskines*,' when he discovered the mistake."

In bad health, and suffering, doubtless, under some sense of disappointment, he retired from the active work of his profession. The closing years of his life were spent at the rural retreat of Ammondell, a place which, like Scott's Abbotsford, he had formed for himself. We have a pleasant description of a visit paid to him there by one whose name Colonel Fergusson has not given. "I recollect," this writer says, "the very grey hat he used to wear with a bit of the rim torn, and the pepper-and-salt shortcoat, and the white neckcloth sprinkled with snuff. No one could or ever did tire in Mr. Erskine's company. He was society equally for the child and for the grown man." It is a pleasing picture of the

evening of life, this old lawyer discoursing music upon his cremona, or delighting his guest with extracts from his book of charades and *bon-mots*.

At Ammondell Henry Erskine spent several peaceful years, and there he died in 1817. His wife, Christian Fullerton, whom he married in 1770, died in 1804. But shortly afterwards he married again. By his second wife he had no family. The elder son of the first marriage afterwards succeeded to the earldom of Buchan upon the death of his uncle, the eccentric David, in 1829.

It is to be regretted that the literary remains of Erskine are so meagre. We cannot of course point to any decisions. Many able pleadings from his pen, doubtless, are buried in the dusty volumes of Session papers, but the most enthusiastic admirer will hardly venture to look for them there. There is a manuscript in the possession of the Faculty composed of epigrams and scraps of a like nature. It is probably the book with which he edified his friends after dinner at Ammondell. He was the author of various poetical pieces, the best known of which is "The Emigrant," written in 1773, and which for a long time was very popular. To the literature of his profession he has contributed nothing. But the annals of that profession are adorned with the record of his truly honourable life, and the name of Henry Erskine will be handed down to posterity as that of one whose memory we dearly cherish.

THE DECLINE AND FALL OF A GREAT HUMBUG.

THE Great Humbug is, "JURY TRIAL IN CIVIL CASES." We have now had an experience of this institution since the year 1815, and we see the fate which has overtaken it, in its almost entire disuse.

Mr. Mackay, in his "Sketch of the History of Scots Law," which has been separately reprinted, and which first appeared in the pages of this Journal, has said that "the experiment of Civil Jury Trial, unpopular in its origin, and not conducted in a manner to remove prejudices by either the judges or the advocates, has never had a really fair trial in Scotland." The author adds to this amazing statement the following remark: "It was specially unfortunate that few opportunities were given for testing its value in mercantile causes at circuits, in the chief commercial centres, where it had proved useful and popular in England." The statement that it has not had a fair trial in Scotland is very singular indeed, coming from one who so perfectly knows its history. For a period of upwards of sixty years this system was the favourite of the Courts; it was forced upon the public and the profession, in season and out of season. It saved trouble; it rendered unnecessary the consideration of complicated proofs; the judges were no longer compelled

to give reasoned opinions upon matters involving disputed fact; the House of Lords was freed from the laborious drudgery of hearing dreary Scottish appeals in which there was this matter of disputed fact. The parties were silenced by the verdict of an unlettered jury; and when they were silenced, the House of Lords was at its ease. The trial by jury was applied not merely to simple questions of negligence arising from the overturning of a coach, but to all questions involving fact—to questions of fraud depending on the most involved circumstances of the transactions of a lifetime, to questions of pedigree, such as the *Shandwick Succession* case, involving an inquiry into family history of upwards of a hundred years, and resting altogether upon documentary evidence. The result is before us in the instructive history of its gradual extinction.

Every successive Act of Parliament dealing with jury trial has been in the way of lopping off one part of it after another, until at last none of those peculiarities, which in the eyes of its friends constituted its great charm and beauty, are to be found existing now. The verdict is no longer required to be the unanimous verdict of the jury, and both parties may address the jury upon the evidence, even though evidence has been led for both. And, still most important of all, there are no cases now which *must* be tried by a jury, the mode of trial being entirely within the discretion of the Court.

There are, however, a certain number of cases yet, which apparently in the mind of some of the judges ought to go before a jury. These are actions of damages against railway companies, actions of damages for breach of promise of marriage and seduction, and declarators of a right of public road,—which, with submission to these learned persons, are the very class of actions that ought *not* to be submitted to a jury. A railway company, although it have a good defence, has never, or at all events very seldom, a fair chance, when the pursuer of the action is the widow of the man who has been killed in the collision. In actions for breach of promise the defender is in as bad a case, when a pretty girl is the principal witness, and tells the story of her betrayal with touching pathos. And as for declarators of a right of public road; the defender ought at the very outset to surrender, because he will be obliged to do so at the conclusion, with a frightful account of expenses to pay.

It is sometimes said that questions of damages are peculiarly appropriate for jury trial. This is a statement which every day's experience teaches to be utterly and absolutely incorrect. Take, for example, those miserable actions for damages for technical informalities in the execution of the diligence of the law, or for saying that some one is no better than he should be—the low litigation which degrades the law, and constitutes nearly the half of the entire mass of our jury cases—in these actions the juries seem to forget all reason, justice, and common-sense; they disregard the

suggestions and comments of the judge; and people who have not one unnecessary sixpence to rub upon another, will return verdicts for extravagant sums of damages. Two hundred pounds are often given where two hundred farthings would be too much. There is indeed no measure, nor reason, nor rule in the mode in which juries deal with damages; and to tell the truth, there is a kind of secret self-gratification in being enabled thus to lord it over the unfortunate defender—a railway company or a gentleman.

The statement of Mr. Mackay, that the system is very popular in England, is also one made without due consideration, and obtains a very direct contradiction from recent events in the South. All the cases in the County Courts may be tried with or without a jury, and nine-tenths of them are tried without a jury. The judges of the High Court of Justice in England have, moreover, reported that it should be confined, in the High Court, to a certain restricted class of cases; and even as regards them, that the judge should have a discretion to order the case to be tried before himself without a jury. The reason is the same in both countries. The instrument whereby we seek to administer justice is utterly unfit for its purpose. It is well described by George Combe: "A Scotch jury, even in Edinburgh, frequently presents the following features for observation: it consists of twelve men, eight of whom are collected from the country, within a distance of twenty or thirty miles from the capital. These individuals hold the plough, wield the hammer or the hatchet, or carry on some other useful and respectable, but laborious occupation for six days in the week. Their muscular systems are in constant exercise, and their brains are rarely called on for any great exertion. Counsel address long speeches to them; numerous witnesses are examined, and the cause is branched out into complicated details of fact, and wire-worn deductions in argument. Without being allowed to breathe fresh air, or to take exercise, they are confined to their seats for many hours, and return a verdict by which they dispose of thousands of pounds." They are in truth very frequently a motley group; so opposite in opinions, so different in knowledge, and so distinct in professions, that they would never by any evolutions of chance have met together in this world before, and except to meet upon another jury, may never meet together for one and the same object again. The amazing paradox is to club together so party-coloured a group, and to ask a verdict from men who have not the same previous knowledge of the subject, and who cannot have the same appreciation of the evidence. To dovetail into one mass the grocer, the tailor, shoemaker, farmer, and clerk, is to call into being a tribunal in whose name indeed a verdict is given forth, but which in reality must be nothing more than the opinion of the most active or the most self-willed unit of the mass. It cannot indeed be otherwise, however much pains the judge may take to explain the evidence for them, and however industriously he may employ short sentences and

words of one syllable. The jury are supposed, on the instant, to perform the most difficult of all the duties of the judicial office; on the instant they are supposed capable of separating good evidence from bad; giving due weight to what is important, and rejecting the immaterial; able to arrange, analyze, and apply the result of the labours of months of preparation. Masses of written evidence are read to them (as in the *Shandwick Succession* case), which they are not themselves allowed to read, even assuming that they had the capacity to do so. Let us, however, admit that the jurors themselves are more the objects of our pity than of our contempt or ridicule. They are compelled to assume an office for the discharge of which they are the strongest witnesses of their own incapacity; and all of them dread the summons that calls them to a wearisome labour and a lost day. Indeed it is not uncommon for a juror, who suspects the object of the registered letter which is the citation presented to him, to refuse to receive it.

But it is needless further to pour water upon a drowned rat. The institution has been nibbled away in bits, like the law of entail, and it will no doubt in a few more years have received the finishing stroke, which will entirely take it from practical life and relegate it to history.

The expedient which has been resorted to, to supply the place of jury trial, is one to which perfect justice has not yet been done. To have the whole of the evidence taken down by a shorthand writer secures, as nearly as possible, a perfect report of what witnesses have said; and one judge at least has the advantage of having seen the way in which the witnesses comported themselves. The judges of a Court of Review are deprived of this great aid in forming an estimate of the value of evidence; but this is in some measure supplied by the report of the judge who saw the witnesses, and whose opinion as to their credibility they would be slow to dispute.

The defects of the system are, that an immense quantity of trash is recorded, and proofs are protracted to a most unreasonable extent. All that is material or immaterial is duly recorded by the stenographer; and a bulky volume represents his labours, carrying along with it, of course, a bulky fee to him. The cause of this is greatly due to the want of preparation on the part of the counsel by whom these proofs are conducted. The same questions are repeated over and over again; the trial is protracted from day to day, because the counsel have to read up their precognitions in presence of the Court; and until a page of precognition has been read no question can be put, and the time of the Court—which is the time of the public—is absolutely wasted. Cross-examination, moreover, seems to be a lost art; the counsel who has to carry it out, instead of confining himself to those points where his client was hit, thinks it necessary to go through the whole case just as if there had been no examination-in-chief. The result is a wearis-

some repetition of the same statements; and in almost every case the cross-examining counsel has made the proof more damning against his own client than when he began. The remedy for this is in the hands of the Court themselves, by simply striking off the expense of two days out of the four during which the proof lasted.

Mr. Mackay's "Sketch," which has suggested the foregoing remarks, is one of the best introductory discourses to lectures upon Scots Law that we have ever read. Nowhere else can there be found within a limited compass so much interesting information about the rise and progress of Scottish Jurisprudence and the legal literature which it has called forth. If we differ from him here and there, our differences are not material. For example, he does not do justice altogether to a writer who has been unjustly neglected. Bankton's Institute contains a vast amount of interesting information (especially about country matters) besides law; and when one in the pursuit of an authority fails to find it in Stair or Erskine, he will in all probability find it in the Institute of Bankton. The judges who preside in the Small Debt Courts ought to make a note of the fact that they will find authority in Bankton for the conclusion, that a father is not liable for the damage caused by his youthful son, who in his playful negligence has broken the windows of a neighbour.

In his rapid sketch of the formation of the law at various epochs Mr. Mackay has also done less than justice to the judges of the seventeenth century,—from 1600 till 1700. All our Equity Law dates from that century. The following century (1700 to 1800) was occupied almost entirely with cases on the Feudal Law; and it has only been within recent years that Equity Jurisprudence has again come to the front. We have a great leeway yet to make up in this matter; but we have now almost inexhaustible sources of supply in England and America, and in the yet unexhausted fountain of the Pandects.

TWO RECENT CASES ON LEGITIM.

THERE are times, we hope, when the conviction dawns upon our wisest legal reader that after all he does not know much law. You find that where you thought you stood secure, so secure that you might venture to lay down a universal rule without a qualm of doubt, you had better have paused before laying it down, better have made avizandum, better have at least limited your rule by a qualification. You determine then that you will never say anything even so elementary as that the assignee's right cannot ever exceed that of the cedent without a wise hesitation and a careful saving clause. Indeed you see your way already, perhaps,

to a pretty strong qualification of the simple proposition we have just taken for our illustration.

In your less cautious days we think you would have seen your way pretty clearly to saying this with some confidence, that the law on the subject of a child taking legitim in place of a testamentary provision made for him by the father was this, that he had parted company for ever by that action with his father's will, that he had "forfeited" his testamentary provision, and that he could not at any future time plead that he was entitled to something more out of his father's estate because his father had intended him to have it. Pressed for a reason for this confident opinion, you would, no doubt, strong in knowledge of legal principle, and sure that your principle was sound and comprehensive, have said (and not without much authority to back you) that for a son to do this would be to approbate and reprobate the same deed—his father's will—and that the law abhorred such running with the hare and hunting with the hounds, and would not permit him to do so. But you did not think then that circumstances would yet raise an exception to this doctrine also which you delivered with such confidence, and that a way would be found whereby in some rare cases a man might take all his legal rights, which his father did not intend him to have, in addition to his testamentary provisions, and yet "ask for more" because his father had intended it, and that without being held to sin against the doctrine of approbate and reprobate.

The circumstances in which it has been held that this may be done are worthy to be attentively considered.

Once more a case regarding the consequences of the taking of legitim instead of testamentary provisions by a child of a person who has died leaving a universal settlement has been sent to the whole Court, and with the result of creating a serious division of opinion. We refer to the case of *Macfarlane's Trustees* (20th July 1882), before explaining the circumstances of which it may be well to say a word or two upon the general rules, which prior to that case were well settled, and which were assumed to be so in the discussion of it. One of them was that where a father had made a general disposition of his estate—that is, where, though knowing that some of what he would leave behind he had no power to dispose of by will, he had yet disposed of it, leaving his children to dispute his will in so far as they chose—there was an implied condition that provisions for behoof of the children were made in consideration of their not disturbing the scheme of the settlement by taking their legal rights. The child, therefore, who took his legal rights refused to fulfil the condition, and therefore had to give up the provision to the acceptance of which it was adjoined. The principle on which this was held to be the law is doubtless that of approbate and reprobate, but what is of even more importance is the reason for which the rule existed, the equity which underlay

it. A rigid attention to that equity explains and justifies, as it seems to us, the decision on which we propose to comment. Now that equitable consideration was this, that the taking by one beneficiary of two shares of an estate which the testator had distributed on the footing that he would only take one, was a clear injury to the other persons to whom gifts had been made. The rule, therefore, was one for their benefit, and one which their interest gave them a title to plead. They could say, "He shall not take the two parts he asks, at least he shall not do so till we have been fully paid the part to which we are entitled." For their interest then, and not that it might act as a sort of penalty to be suffered by the disturber of the settlement, the rule existed.

The other rule to which we have referred fitly follows that to which we have just alluded. It was simply this, that the testamentary provision which the child taking legitim could not take up was to be handed over to the persons really injured by the election the child had made. That seems to us the shortest statement that can be given of the result of the important case of *Fisher v. Dixon* (2 D. 1121, and 2 Bell's Appeals, 63).

In that case a most important question as to the nature of legitim was discussed and set at rest. It was settled there that whenever the death of the father occurs each child has a vested right to a certain part, proportionate to the number of children there are, of the third, or it may be, the half of the father's moveables, which constitutes legitim; and that this right differs not only from the right to legitim which the child all along had if he survived his father, and the father left any free moveable estate, in the absence of the conditions which before qualified it, but in the fact that it was not capable of being altered in amount by anything another child might do. If the father in his life settled with a child, and the child gave up his claim for legitim, the other children were benefited thereby, because the number of persons among whom division fell to be made was smaller by one. Some of the judges of the Court of Session failed to see why, if this was the result of the satisfaction of one claimant during the father's life, the result should not be the same if the person into whose hands the father's estate had come settled with a child after the father's death. "This child was satisfied with the testamentary provision made for it," they said; "so much the better in this case also for the others." The House of Lords, however, concurred with the majority of the Court of Session in holding that the father's general donee ought to get the benefit of the arrangement he had made with the child. He was debtor to the child either in the one sum or the other, either in testamentary provision or in legitim; and if he settled with his creditor, he got a release for himself and not for any other. This judgment implied both that the child is entitled on his father's death to a fixed share of legitim, which is subject to no condition except the existence of the moveables left by the

father, though it may be some time before the existence and amount of such moveables is ascertained, and it implied also that the legitim fund of a person who dies leaving children is not so absolutely cut off from the rest of the estate that nobody can take it but the children. If a child, then, is satisfied apart from it, and the father did not mean him to take both legitim and the provision which satisfies him apart from it, the father's donee, out of whose pocket that provision came, may console himself by pocketing the legitim which the child has elected to give up his indefensible claim upon. The other children had no claim to it. They were not concerned in the transaction between their brother and their brother's debtor. In like manner if the child took his legitim and laid his rights under the will aside, the person to take up these rights was the debtor who had to pay the legitim, the father's general donee, not the other children.

After the date when this point was settled there grew up in our law the name and doctrine of Equitable Compensation. The persons claiming through the settlement, and whose rights under the settlement were diminished by the taking of legitim by any of the children, were said to be equitably compensated by appropriating the testamentary provision which the child who took legitim had thereby rejected. These persons were in most cases, of course, the father's other children who were willing to abide by his settlement. But supposing the testamentary provision which they thus took up did compensate them; supposing they each and all received, by applying it to make up for the sum carried off from them in legitim, the full amount which the testator meant them to have, what then? What of the surplus? Could they take it, and so be more than compensated? That seemed a difficult conclusion, if equitable compensation was the right name for the process by which they had absorbed the testamentary provision of the child who had cut himself off from the operation of the will. But had he cut himself off from the operation of the will so completely? Was this a bad bargain for him by which he forfeited for ever any gift under the will, and was bound ever after to content himself with his legitim? Was it too late for him, who had cast his father's intention to the winds, to plead that intention still, and to say that he had now discovered that he had been foolish in his choice and would be fain to take what still remained of what he had declined to take before? Even if it was too late for him to do so, there would seem no reason for giving what had been meant for a provision for him to persons who had already received all that the testator intended to give them. There was as little ground surely for them to plead the testator's intention to that effect as there could be for him to plead it still on his part. If neither they nor he could take this surplus, to whom could it go?

These questions, which seem to be inseparable from the doctrine of equitable compensation, do not seem to have arisen for decision

until the occurrence of the recent case of *Macfarlane's Trustees*. The reason, we think, for this was twofold. First, there was the obvious reason that the surplus the existence of which gives use to the question is not of very common occurrence. The child who takes legitim usually makes a careful and sound calculation of the advantage of the course he is taking. The second reason, we think, is that the profession has usually looked on the election he makes as a final one, and many a man has doubtless been advised after he has spent his legitim that he can by no possibility have any claim under his father's general settlement containing provisions in his favour. But in the case of *Macfarlane's Trustees* these questions did arise, and in these circumstances. A Mr. Macfarlane died, leaving a widow and two children—a son, George Macfarlane; a daughter, Mrs. Oliver—and leaving also what appears, and indeed was, one of the simplest settlements of his means and estate that could well be made. He left his widow a certain annuity, he left a few legacies, and he directed the whole residue of his estate to be divided into two parts, of one of which his son should have the liferent only and his children the fee, while of the other the daughter, who was married and had children, was to have in like manner a liferent only, excluding her husband's *jus mariti*, and her children the fee. Failing the son and his children, the liferent and fee provided to them respectively was to go to the daughter and her issue, and in like manner the daughter's portion, if she and her issue failed, was to go to the son and his issue. The provisions to the children of the son and daughter were to vest after the death of the parents and after they reached majority. By this universal disposition the father affected to dispose of his children's legitim, being of course unable to do so except indirectly through the implied condition that a child could not carry off both his legal provision, thus in so far reducing the will, and at the same time, and founding upon the will, the liferent given him by the testament. In these circumstances the son, looking upon the liferent of half the estate as a better provision for him than legitim, abode by the will; the daughter, preferring after some deliberation ready cash with all its risks, and particularly with the risk that it would come into the hands of her husband and his creditors as well as into hers, took her legitim. She became what English lawyers oddly but expressively call a "refractory donee." This election of hers, according to an earlier case of *Fisher v. Dixon* than that between the same parties to which we have before referred, was an election purely for herself, and did not import an election for her children, the fiars of the fund from which her liferent was to come. Her provision under the will therefore, and it alone, went according to the decision in the second case of *Fisher v. Dixon*, to her father's disponees, that is, to the trustees for the general purposes of the settlement. Now as the estate was diminished by her withdrawal of her legal share of it, the two liferents and the fees into which the remainder was divided under the

provisions of the will suffered a corresponding diminution, and the trustees accordingly applied, as they were bound to do, the life-rent which Mrs. Oliver had given up to reimburse her brother and his children as well as her own children for the injury done to their respective rights of life-rent and fee. Now, had Mrs. Oliver died in a year or two after making her election, before the income derived from her life-rent had amounted to the value of the legitim she carried off, she would have been said to have "forfeited" her testamentary provision, and also to have injured the other life-renter and his children. Her own life-rent would, according to a clause in the will, have been spent in educating and maintaining the children (if still under age), who were presumptively the fiars of it. But in the circumstances which really occurred the question raised was whether "forfeiture" is the correct word to describe the process by which she had to give up her life-rent to the purposes of the settlement. Mrs. Oliver lived long enough to see that she had made a very bad bargain. She had the vexation of finding, long after she had spent her legitim, that she would have got more money by being content with her life-rent; for the life-rent she had once despised proved to be sufficient to replace in the hands of those who had been content to abide by the will all that they had lost by her taking legitim, while every year she lived would prove more conclusively the inferiority of what she had taken to what she had rejected. It was in these circumstances that the true nature of "equitable compensation" came to be determined. Mrs. Oliver maintained that by what she had done she had not cut herself off from the will for ever, and (not without apparent hardihood) she appealed to her father's intention as showing that he, more wise than his daughter, had meant something better than mere legitim to go to her; and she maintained that though she had now eaten her cake she had at least paid for it to those from whom she had exacted it, and was now entitled to the good things of the feast which still remained, and which she meant to share as perhaps a sadder, but still as an invited and quite appreciative guest. Everybody else, however, who was interested in the banquet made common cause in shutting the door in her face. She had done her best to spoil it they said, and should she now, when she had openly declared her refusal of the invitation addressed to her, and had carried off a part of the viands for solitary consumption, leaving them in imminent risk of finding their "provisions" smaller than their appetites, come back to partake of the feast? Not so. It was immaterial that now at least they had been put in possession of all they had lost. Their compensation for the risk they had run by Mrs. Oliver's speculations was still to come. She had reprobated the will, and it was too late, as well as unfair, to approbate it now. A majority of the whole Court, affirming the decision of the late Lord Curriehill, have held that Mrs. Oliver was now entitled to

come back to the position she had left, and to take the benefit of her late-won wisdom, or perhaps we should say of the shrewdness by which she has secured, *against* her father's will, a part of his estate at his death in hard cash at her own disposal, and a part of it, *according* to his will, in the shape of an alimentary liferent. This decision is based upon two principles—the *first*, that the “refractory” Mrs. Oliver gave up her liferent as “compensation” only in a literal sense, and not as *surrogatum* for the legitim she carried off; and the second, that the intention of the testator would be best carried out by giving the child who made reparation for the despite she had done to that intention as nearly as possible what had been originally meant for her. The minority of the judges regarded the case as one forming a good example of the doctrine of approbate and reprobate, and were divided as to whether the surplus liferent which they held the daughter was to have forfeited was intestate succession or fell under the residuary clause, and ought therefore to be divided among those favoured by it other than Mrs. Oliver. The latter of these views was exposed to the difficulty that it would give more to the “disappointed legatees,” as they would be called in England, than the testator meant for them, and thus impart to their disappointment a very agreeable quality. The former view, though perhaps the sounder of the two, was exposed to almost as great a difficulty—that of holding that there was a partial intestacy where there was a settlement purporting to be universal, and containing a residuary clause.

There are one or two practical considerations which we think arise as the result of the decision to which we have now referred. In the first place, the importance in a settlement of a general character of a clause which shall either declare the provisions of the settlement to be in full of the legal rights of a widow or children is strongly exemplified. A testator who intends his testamentary gift to be in full of legal rights should say so expressly and not trust to any implied condition that a child taking legitim shall altogether abandon all claims under the settlement, or to what was before looked upon as the impossibility of a child repudiating the will to the extent of taking his legal rights and then at some later day founding on it for the purpose of taking testamentary benefit. The same thing may be done also, of course, by means of a direct clause of forfeiture; and it will be observed that Lord McLaren, in the singularly interesting and lucid opinion in which he expresses the view of the majority of the Court, points out that the principle of forfeiture is different in its nature from the principle of equitable compensation, and may in some circumstances produce different results.

In the next place, it appears to us that difficulties will yet arise as to the application of the doctrine of equitable compensation as fixed and defined by this decision. The Court have previously held a child not entitled to defer making his election, but bound,

on the contrary, to make it within a reasonable time after the death of the father. It may be taken as certain that the Court would not allow a trust to be kept up for the purpose of enabling one of the children entitled to legitim to interrupt the division of the funds among those who remained content with the settlement. Suppose, then, one child to take his legitim while the value of some provision of the settlement which he regrets remains contingent, and that this provision is accordingly handed over to the others and the estate divided. If this rejected provision afterwards turn out more valuable than the legitim, can the child who has chosen badly replace the legitim and demand the surplus over its amount of the provision? According to the logic of this decision, it would seem that he can, but the working out of the process might be hopelessly involved. There was certainly a simplicity about the view which we believe to have been taken in practice, that the provision once rejected was for ever forfeited and passed as *surrogatum* to those whose interests under the settlement were affected, which the new view does not possess, albeit it has the merit of being a logical way of carrying out the object, and the whole object, of the doctrine of equitable compensation,—that of making up to the injured legatee what he lost by the election made to his prejudice. It is indeed hard to see why he should ever have more.

In the last place, this case seems to establish a good doctrine for prodigal sons. Take your legitim, O prodigal! we would say to such, and reject the liferent, fettered by many a harsh condition, which is offered to you instead of it. You will have ready money now, if you do so; and you need not look with anxious eye upon the two good things offered to you as if, if you take the tempting one, the solid value of the other is for ever gone. Your faith in your future—the chief inheritance of prodigals, after all—will tell you that you will some day by a lucky hit restore to the other beneficiaries you are about for a time to injure the legitim you are to carry off; and if you have only a little cash just now, you may do that any day. At the worst of it, if you live long enough—and of course you will live long enough—your liferent will make up to them in time, and then you will have that safe provision for your old age restored to you, and no doctrine of approbate and reprobate will stand in your way. Therefore put money in thy purse. That “intention of the testator” of which Courts are so fond that they will not let you defeat it, though you may evade it for a time, will come to your aid at last.

But the question will recur to us, do what we may, Is this precious thing, the testator's intention, not a little in danger from a decision which seems to imply that it may to some extent be safely set at nought?

In the case of *Monteith* (decided by the Second Division on 28th June, 19 S. L. R. 740) we have another important decision on the subject of legitim, and one which, from the nature of the question which arose in it, is more likely to be a valuable guide for the

future than the case of *Macfarlane*, but on which we have left ourselves little room to comment.

A father died leaving several daughters, all of whom had been married in his lifetime, and one son. He bequeathed to his son a life-rent of £5000 with the fee to his children, and he gave the whole residue of his estate to trustees, with instructions to convey it to the marriage-contract trustees of his daughters, to be applied by them in the same manner as certain handsome marriage portions he had previously given them. As the moveable estate alone amounted to over £80,000, it was plainly the son's interest to claim legitim, and the importance of the case lay in the manner in which the Court held that the legitim fund ought to be ascertained. The son, though the only child claiming legitim, claimed that according to the doctrine of *collatio bonorum inter liberos* the amount of the daughters' marriage portions ought to be added to the legitim fund. It was the presumption, he said, that a father meant equality to prevail, and equality would be the result if the legitim fund were restored to its proper dimensions, and he received the fifth of it, which vested in him at his father's death. To the answer made by his sisters that *collatio inter liberos* only applies between several children claiming legitim while they took under the will, he replied that they were really claiming legitim because they took through their marriage-contract trustees what was really part of the legitim fund. His case on this point, as put by the Lord Ordinary, who adopted the argument maintained for him, was this. According to the case of *Fisher v. Dixon*, each of the children had a vested right in a fixed share of legitim at the father's death, and if the daughters had claimed legitim, they would have had to impute their marriage provisions to the fund, unless they could show that they were intended to have both. It was therefore fair that they should be imputed in reckoning the amount of the fund from which the son should take legitim, since the daughters were really taking legitim through their father's trusts. This view was adopted by Lord Craighill in the Inner House, but was rejected by the majority of the Court, who proceeded upon the simple ground that *collatio inter liberos* did not apply to a case where only one child claims legitim, and that no ingenious reasoning to the effect that they were obtaining the benefit of their legitim by the receipt of the marriage and testamentary provisions ought to prevail. Lord Craighill thought to say that the daughters were not claiming legitim was really a *petitio principii*, because the trustees were in the position of their assignees, a view which seems fully met by the valuable expressions of opinion from the majority of the Court to the effect that the position of the general disponent who has satisfied the claim of a child for legitim by the proffer of the testamentary provision, is not really that of an assignee to his claim, but of a debtor whose debt is extinguished, an opinion easily established, as it seems to us, from the opinions in *Fisher v. Dixon*.

DENTISTS.

ANY man may have and many a man does have the toothache, but the tingling of the little white thread of a nerve seldom causes good to accrue to the human race in general. I, however, being charitably disposed, and bred to the law—"which is one of the first and noblest of human sciences, a science which does more to quicken and invigorate the understanding than all other kinds of learning put together"—I, being such an one, when I had a toothache, read up things dental in the light of things legal, and revolved them in the laboratory of my brain, and the result of my labours I give to the world free of charge for the benefit of those who in the future may suffer the like pains and penalties.

The only recipes for toothache I remember to have met with in the law-books are the old, old ones given by Marcellus three hundred and eighty years before our era; they are, "Say *argidam*, *margidam*, *sturgidam*, or spit in a frog's mouth and request him to make off with the complaint" (Glenn's Laws affecting Medical Men, p. 5). Neither recipe ever did me any good.

I knew well the maxim, *Qui sentit commodum sentire debet et onus* (*Anglice*, He who has had the dance must pay the piper), still, although I had enjoyed the advantage of this bone for many a long year, I was unwilling now to bear the burden of its aches and resolved to be quit of it. Had I lived in the days of Henry of six wives I would have gone to one of the little shops where was exhibited the bandaged pole as a symbol or sign "that all the king's liege people there passing by might know at all times whither to resort in time of necessity" (32 Hy. VIII. ch. 42, sec. 3), and there in the person of a man "occupying and exercising the feat or craft of barbery and shaving" I would have found my drawer of teeth. If my tooth had ached between the tenth and eleventh centuries, I would have visited a monk or priest, and having confessed my pains, would have received physical comfort by a spirited jerk being given to the erring member. A decree of the Council of Tours forbade the clergy undertaking any bloody operation, and thereupon their surgical practice fell into the hands of blacksmiths and barbers.

The latter soon became the more important class, and in the year 1461 the freemen of the mystery or faculty of surgery were incorporated by letters-patent of Edward IV. In time, however, others arose who practised pure surgery, and in 1540 these two bodies, by Act of Parliament, were united under the name of "The Masters or Governors of the Mystery and Commonalty of the Barbers and Surgeons of London" (32 Hy. VIII. ch. 42). Section 3 of this Act, on account of the fear of contagion, forbade any one in the city of London, using barbery or shaving, to occupy any surgery, letting of bloods or any other thing belonging to surgery, drawing

of teeth only excepted; and on the other hand, no one using the mystery or craft of surgery was allowed to occupy or use the feat or craft of barbery or shaving.

In the Anglo-Saxon world things have changed now, and although a sign is a *prima facie* evidence of the profession and character of the sign-owner (*Sutton v. Tracy*, 1 Mich. 243), still something more is now required of dental surgeons, and in nearly every civilized land candidates for this profession must pass an examination on subjects appertaining to their craft.

Some feel a little nervous when they reach the dentist's; to such I would commend the legal maxim (although perhaps it was not intended to apply to exactly such cases), *Cuilibet in sua arte perito est credendum* (Trust or credence should be given to one skilled in his peculiar profession).

Dentists are subject to the same rules as to negligence as are physicians or surgeons (*Simonds v. Henry*, 39 Me. 153), and if by culpable want of attention and care, or by the absence of a competent degree of skill and knowledge, a D.D.S. causes injury to a patient, he is liable to a civil action for damages, unless indeed such injury be the immediate result of intervening negligence on the part of the patient himself, or unless such patient has by his own carelessness directly conduced to the injury (Glenn, p. 251; Add. on Torts). The law is ever reasonable; so it only requires of a dentist a reasonable degree of care and skill in his professional operations, and will not hold him answerable for injuries arising from his want of the highest attainments in his profession. The rule is that the least amount of skill with which a fair proportion of the practitioners of a given locality are endowed, is the criterion by which to judge of the professional man's ability or skill (McClelland's Civil Malpractice, p. 19). As far as the liability is concerned no distinction is made between those who are regular practitioners and those who are not so; the latter are equally bound with the former to have and to employ competent skill and attention.

A patient must exercise ordinary care and prudence (*Eakin v. Brown*, 1 E. D. Smith, 36); so that if one tells the dentist to pull out the tooth, but does not say which one is to go and the wrong one is taken out, the sufferer has no legal ground of complaint, unless indeed it is quite apparent which is the offending member. A patient may be a little careless and negligent, still if the doctor or dentist has been so very neglectful of his duty that no ordinary care on the part of the patient would have prevented the mistake or injury complained of, the patient will recover, i.e. recover damages for the injury received (*Clark v. Kerwin*, 4 E. D. Smith, 21; *Parker v. Adams*, 12 Metc. 417).

The fact that one has taken chloroform will not affect his rights or remedies against the tooth-puller for any mistake or negligence; for the maxim *Vigilantibus, non somnientibus jura sub-*

veniunt has no reference to people put to sleep by anaesthetics. The fact that a dentist extracts teeth for love and not for money does not relieve him of his liability for failure to perform his work properly (*Street v. Blackburn*, 1 H. Bl. 159; *Wilson v. Brett*, 11 M. & W. 113); and if I am verdant enough to allow a green apprentice to practise on my jaws, I can still recover from the dentist for any injuries (*Henke v. Hooper*, 7 C. & P. 81). It is a good answer to an action brought by a dentist to recover payment for his work and labour that the patient has been injured instead of benefited by the plaintiff's treatment, either because of his want of skill or of his negligence. So, where Mr. Gilpin went to Mr. Wainwright to have a tooth extracted, and Wainwright gave him chloroform, and then pulled out the wrong tooth, and Gilpin declined to pay for the performance, alleging a want of consideration, the dentist sued for his account, but the Court gave judgment against him (Glenn, p. 209). If the dentist's bill has been increased owing to his own mistake or wrongdoing—as where being employed to pull out one tooth and insert a false one, he pulled out two and so has to put in two—he cannot recover for this additional amount of work. Lord Kenyon well put this when he said, “If a man is sent for to extract a thorn which might be pulled out with a pair of nippers, and through his misconduct it becomes necessary to amputate the limb, shall it be said that he may come into a court of justice to recover fee for the cure of the wound which he himself has caused?” (Peake's N. P. C. 83, 84). No, indeed! say I. In fact, in such a case as the one I put it would appear that not only could no recovery be had for the additional services rendered necessary by the dentist's own want of proper care, but the man whose grinders were thus made few would be entitled to a further deduction from the bill for the bodily suffering and damage he had sustained (*Piper v. Menifee*, 12 B. Monr. 465).

One cannot reasonably expect to have teeth as well fitted to the mouth by art as by nature. Mrs. Henry got a set of artificial ones from Dr. Simonds; when put into her mouth she complained that they felt odd and pained her. The plate was then somewhat filed, but she was still dissatisfied and declined to pay the bill. It was then agreed that she should take them away and try them for a day or two; this was done, and again she returned them declining to pay. The doctor then sued, and the evidence as to whether the teeth fitted was conflicting. One testified that they were a good piece of work; another that they were a fair average piece of work; while a third said they were nothing extra. The judge instructed the jury that if Simonds had used all the knowledge and skill to which the art had at the time advanced, that would be all that could be required of him. The verdict was for the defendant. On an application for a new trial the Court considered the instructions erroneous and granted the application, saying, “that surgeons are held responsible for injuries resulting from a want of ordinary

care and skill. The highest degree of skill is not to be expected, nor can it reasonably be required of all. The instruction given was . . . undoubtedly correct, and no more would be required of him. But upon legal principles could so much be required of him? We think not. If it could, then every professional man would be bound to possess the highest attainment and to exercise the greatest skill in his profession. Such a requirement would be unreasonable" (*Simonds v. Henry*, 39 Me. 155). It is a dangerous thing for both parties for the dentist to try a new instrument or a new *modus operandi* for the first time—doing so, the Court once said, was a rash act, and he who acts rashly acts ignorantly. Using a new instrument is acting contrary to the known rule and usage of the profession (*Slater v. Baker*, 2 Wils. 359, 362). One cannot become an experimentalist except at his peril. I found *Bogle's* case an interesting one on the subject of the use of chloroform; he was a street-car driver in the city of "brotherly love;" a vicious female (horse) by a kick threw him from his platform so that he hit his head against a tree-box. He was picked up insensible and carried into a surgery; this he was able to leave in a couple of hours, and the following day he went to work again. In course of time he had a toothache, and not relishing it he went to Dr. Winslow's office for the express purpose of having teeth extracted, intending to take chloroform. The chloroform was administered but did not operate as soon as usual, exciting rather than tranquillizing B. Insensibility however having been finally obtained, the teeth were taken out, the doctor giving the anæsthetic from time to time as symptoms of returning consciousness appeared. Bogle walked home shortly afterward, feeling however dizzy and being rather tottery in his gait; these unpleasant symptoms continued even after reaching his house. The next day thickness of speech and numbness of one side and arm came on, and in a day or two he was struck with partial paralysis. From this he was still suffering when a jury was called upon to say whether his wretched state was due to the neglect of Dr. Winslow or not. The judge told the jury that "even if they doubted the safety of the agent (the chloroform) employed, there is still a consideration of the highest reason which they ought not to disregard. All science is the result of a voyage of exploration, and the science of medicine can hardly be said to have yet reached the shore. Men must be guided therefore by what is probably true, and are not responsible for their ignorance of the absolute truth which is not known. If a medical practitioner resorts to the acknowledged proper sources of information—if he sits at the feet of masters of high reputation and does as they have taught him—he has done his duty and should not be made answerable for the evils that may result from errors in the instruction which he has received. . . . He who acts according to the best known authority is a skilful practitioner, although that authority should lead him in some respects wrong. . . . If the plaintiff was

from previous circumstances predisposed to paralysis, it might well happen that the extraction of his teeth without the chloroform or the use of chloroform without the extraction, would bring on a paralytic attack. Even if this was the case, still it would not be just to make the defendant answerable for consequences which he could not foresee, which were not the ordinary or probable result of what he did. He was only bound to look to what was natural and probable, to what might reasonably be anticipated. Unless such guard is thrown around the physician his judgment may be clouded or his confidence shaken by the dread of responsibility at those critical moments when it is all important that he should retain the free and undisturbed enjoyment of his faculties in order to use them for the benefit of the patient (*Bogle v. Winslow*, 5 Phil. (Pa.) 136).

Sometimes accidents will happen and dentists fail to get their money. A dentist at a lady's request prepared a model of her mouth and made two sets of artificial teeth for her. In response to a letter notifying her that all things were ready and asking when he could see her to fit them in, he received a kind letter as follows: "My dear Sir,—I regret, after your kind effort to oblige me, my health will prevent my taking advantage of the early day. I fear I may not be able for some days.—Yours, etc. Frances P." Without more ado the lady died. The dentist sued her executors for £21, but he got nothing for his trouble and pains. The Court held that a contract to make a set of teeth is a contract for a sale of goods, wares, or merchandise within the meaning of the seventeenth section of that obtrusive statute, the Statute of Frauds; and that as by the terms of the contract the teeth were to be fitted to Fanny's mouth, and as this through no default on her part was never done, her executors were not liable to the dentist for work done and materials provided; nor was the letter a sufficient memorandum within the meaning of the Act referred to. Counsel for the plaintiff and the Court seemed in this case to differ widely in their opinions as to the artistic nature of tooth-making. The former, arguing that the defunct lady had in truth contracted for the skill of the dentist, and that the materials were merely auxiliary to the work and labour, said this case is not to be distinguished from that of an artist employed to paint a picture. The ivory used was of insignificant value as compared to the skill employed. Judge Crompton however said, "Here the subject-matter of the contract was the supply of goods. The case bears a strong resemblance to that of a tailor supplying a coat; the measurement of the mouth and the fitting of the teeth being analogous to the measurement and fitting of the garment" (*Lee v. Griffin*, 1 E. B. & S. 272).

Willard Andrews had a conversation with Leonard Gilman as to the latter furnishing the former's wife with a plate of mineral teeth, and he agreed to pay for certain other dental services rendered Mrs. A. The plate was furnished while Mr. A. and Mrs. A. were living

together, and it was quite suitable to A.'s circumstances and station in life; he saw it, knew whence it came, and raised no objection, but declined to pay. The Court however considered that he was liable, not only because the wife's being permitted to retain the plate, and the other circumstances, showed her authority to make the purchase, but also on the ground that the plate was one of those necessities wherewith a husband has to furnish his consort (*Gilman v. Andrews*, 28 Vt. 24). It is impossible to say how far this doctrine of necessities may be extended—will it ever include false eyes, false hair, false hearts? 'Tis the judges alone who can say.

Although a dentist is often allowed "to do a man out of his eye-teeth," still he must not be too grasping, and must not take an unfair advantage of one, even though—in the language of the ring—he may have his head in Chancery. If he does he may get his whole body into that same place. Some thirty odd years ago a very old man, Captain Simpson by name, a jolly tar, who had a room in Greenwich Hospital, gave a bill of exchange payable eight months after date for £262, 0s. 10d. to one Davis, a London dentist, purporting to be for value received. Davis said the real bargain was that he should during the whole of the captain's life attend to his teeth and supply him with new ones from time to time. What a bonanza was here, even though the old man should have passed every remaining hour of his existence in munching sea-biscuits and chewing salt junk, for even according to the dentist a new set of teeth would only cost between £30 and £50! The bill was in the handwriting of D.; it was given in his house when no third person was by, and it was never heard of till after the captain's death, which took place before it was due. There was no writing as to the teeth. The executors of S. were not inclined to pay, whereupon D. handed the note over to a creditor of his own and an action was brought on the joint account of the two. The executors filed a bill in Chancery impeaching the document for fraud and asking that it might be delivered up to them. The Court thought it was quite impossible for any reasonable being to draw any inference from the materials before it but that it was a case of fraud—nay, of gross fraud—and that the decree was made as asked (*Allen v. Davis*, 4 DeG. & S. 133). Sir Lancelot Shadwell thought the case had points of resemblance to the remarkable one of *Dent v. Bennett* (4 My. & C. 269), in which a medical man bargained for a very large sum of money to attend a person of advanced years. The doctor in that case agreed to attend to the entire frame of the patient. The undertaking spread over the whole body, and was not confined to a particular portion of the frame, as was the contract in this particular case.

In the olden times front teeth were considered very valuable—our ancestors appear to have used them in fighting, and the hurting a man so as to render him less able in fighting to defend himself

or annoy his adversary was considered a misdemeanour of the highest kind, and spoken of by my Lord Coke as the greatest offence under felony. To cut off an ear or strike off a nose was as nothing to the knocking out of a foretooth, for a nose or ear is useless in a fight—doubtless they are in the way (Russell on Crimes, vol. i. p. 720).

According to that system of punishment introduced into England by the Engles, which compensated every injury by a money payment, a front tooth was valued highly, and one who deprived another of that important portion of the human form divine had to pay six shillings, while breaking a rib only cost half as much, and shattering a thigh only twelve shillings (Taswell-Langmead, p. 41). By the time I had got this far in my cogitations I had lost my toothache, as I suppose my readers have their patience.—R. VASHON ROGERS, Jr., in *Albany Law Journal*.

The Month.

Punishment of Juvenile Offenders.—We published extracts from the reports of the Magistracy in England and Scotland in answer to the circular of the Home Secretary on juvenile delinquency. (See number for May, p. 266; and number for July, p. 634). We now do the same as to the opinions of the Magistracy in Ireland. This is given in a much smaller space than that of the sister kingdoms. Two pages are sufficient to comprise the opinions of County Court Judges and Chairmen of Quarter-Sessions. A *précis* of their replies is given, and bears date Dublin Castle, 9th April 1881, and is subscribed by T. H. Burke, whose tragic murder so soon after the conclusion of the year imparts a mournful interest to this portion of the volume.

1. The County Court Judge and Chairman of Quarter-Sessions for counties of Carlow, Kildare, Wexford, and Wicklow is in favour of inflicting "upon male offenders under sixteen years strokes with a birch rod, the number of strokes to be defined by Act, and to be regulated by circumstances of each case. Order for flogging to be signed by two justices or by a stipendiary magistrate. Medical examination to precede punishment, and parent have right to be present thereat" (p. 235).

2. The Recorder of Londonderry "advocates flogging for both sexes, a suitable dress being used to obviate objections to stripping" (p. 236).

3. The County Court Judge and Chairman of Quarter-Sessions for Clare County "objects to whipping as being calculated to harden and brutalize, and that five years in a reformatory are too long" (p. 236).

4. The County Court Judge and Chairman of Quarter-Sessions

for the county of Down "thinks whipping with proper safeguards would be more deterrent than imprisonment" (p. 236).

5. The County Court Judge and Chairman of Quarter-Sessions for King's County, Meath, Westmeath, and Longford states that the magistrates incline to the reformatory, or some similar system, while some few believe in flogging." But he himself "objects to whipping as being an unequal punishment owing to difference in constitution and temperament, and as being calculated to harden the recipient, especially where he returns at once to his associates" (p. 236).

6. The Recorder of Belfast "thinks that flogging would be a means of correction and improvement" (p. 236).

7. The County Court Judge and Chairman of Quarter-Sessions for the county of Limerick "concurs with the magistrates in thinking that flogging should be resorted to in trivial cases without sending to gaol" (p. 236).

8. The County Court Judge and Chairman of Quarter-Sessions for the counties of Cavan, Leitrim, and Waterford "concurs with justices that the age of juvenile offenders should be extended to sixteen, and the power given to justices extended to all offences punishable in a summary manner, and that a birch rod only should be used for whipping" (p. 237).

Other Irish magistrates gave no opinion as to corporal punishments, but are against imprisonment, and suggest the punishment of the parents or guardians of juvenile offenders, and recommend houses of detention, industrial schools, and reformatories for juvenile offenders.

The Blue-Book proceeds to give the opinions of managers of industrial schools, reformatories, and chairmen of school boards.

9. Major Inglis, H.M. Inspector of Reformatories and Industrial Schools, gives a valuable opinion on the treatment of juvenile offenders. He states that "another remedy of a sharper character might very well be given a fairer and freer trial in dealing with mischievous and malicious children. I mean the application of the birch rod, especially for cases of wanton mischief or cruelty." He does not feel disposed to believe that the birch is a general panacea for all the wickedness of juvenile urchins, but, judiciously applied, it is likely to be serviceable in its correction and prevention" (p. 238).

The general opinion of managers of industrial schools and reformatories and board schools are against any punishment, and in favour of parents and guardians being compelled to contribute for the juveniles under detention. Much valuable information is given as to the proper treatment of children and the management of schools. The volume concludes with the laws and rules of foreign countries as to juvenile offenders. By the laws of Hungary, "any person under twelve years of age at the time of commission of a crime or misdemeanour is free from criminal indictment, but above

twelve and under sixteen cannot be punished for it if he has not sufficient mental capacity at the time to be conscious of the criminality of the act, but such juvenile offenders may be sent to the reformatory, but they cannot be kept there beyond the age of twenty" (p. 299). It appears that correction by flogging is not practised. The report from Germany states that "corporal punishment is never resorted to in the case of juvenile offenders" (p. 298). While committal to common prison is deemed inexpedient, reformatories, penitentiaries, and separate houses of detention are recommended for juvenile offenders. All connected with scholastic establishments, especially of a penal kind, will derive from the volume much valuable information as to the treatment of juvenile offenders, and the magistracy of the United Kingdom will derive great aid in dealing with this most important part of their official duty.

NESTOR.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF LANARKSHIRE.

Sheriff MAIR.

FLEMING v. CLARK AND OTHERS.

Working minerals—Liability for damage—Lease.—This was an action at the instance of James Fleming, portioner, Linlithgow, against James Towers Clark of Wester Moffat, near Airdrie, and also the trustees of the late William Adam, coalmaster, of Broomfield, Airdrie, and the Broomfield Coal Company, carrying on business as coalmasters in Airdrie, and the individual partners thereof, concluding for payment of £350 for damage done to pursuer's property in Airdrie through the underground workings of the defenders. The interlocutor fully explains the nature of the case.

"The Sheriff, *inter alia*, finds that by feu-disposition dated 1st February 1844 the late Dr. William Clark of Wester Moffat conveyed to William Simpson, ironstone contractor, Airdrie, all and whole the subjects in Clark Street, Airdrie, now belonging to the pursuer, and that the feu-disposition contains the following clause, 'Reserving always to the said William Clark and his heirs and successors the whole coal, metals, and minerals on the said piece of ground, with liberty of working and carrying away the same on paying the said William Simpson for the surface damage thereby occasioned, as the same shall be ascertained by arbiters mutually chosen for that purpose;' that by disposition dated 29th December 1846 the said Dr. William Clark sold and disposed to Messrs. Merry & Cunningham, ironmasters at Carnbroe, the coal and ironstone and whole other metals and minerals lying, *inter alia*, in the ground feued to William Simpson, under the same conditions and obligations as to working the same as are contained in the feu rights of the surface, and on which disposition the said Merry & Cunningham were infeft conform to instrument of sasine recorded in the General Register of Sasines at Edinburgh 13th January 1847, and that by disposition dated 26th November 1851 Messrs. Merry & Cunningham sold the said coal and metals and minerals to Messrs. William Simpson & Archibald Reid, and that by disposition dated 26th April 1872 Messrs. Simpson & Reid sold the same to the late Mr. William Adam of Broomfield, to whose trustees (the defenders in the present action

they now belong ; that by minute of agreement and lease dated 26th and 30th November 1876, the defenders Mr. Adam's trustees let to the other defenders the Broomfield Coal Company, *inter alia*, the seams of coal in the ground feued to William Simpson, and now belonging to the pursuer, but under the declaration that the tenants 'shall and hereby are debarred from carrying their working under this lease nearer the property and feus of the feuars of the Broomfield and Brickfield properties than is allowed by their respective feu rights, nor shall they be entitled to work out the coals from under any feus where the proprietor has a claim for the damages that may be caused in doing so without the express written authority of the said first parties hereto,' viz. Mr. Adam's trustees, and under the provision that the said tenants 'shall be bound to pay to the first parties and their tenants, and to the feuars whose properties are in or adjoin the subjects under which the coal is hereby let, and to all others entitled thereto, all damage of whatever kind which may be done or occasioned by their workings and operations, and to free and relieve the said first parties and the trust-estate under their management of all claims in any way competent for such damages, and of all loss and expenses which may be incurred by them in such claims ;' that the pursuer, who acquired in the year 1876 the subjects feued to William Simpson, alleges in the present conjoined actions that since the beginning of the year 1881 the dwelling-house and offices, which have been built on the subjects, and the boundary wall surrounding the feu, have shown signs of injury and damage caused by sits or subsidence, and that these injuries have gradually increased, and have been caused by the underground operations in excavating the coal or other metals and minerals under the subjects and in the immediate neighbourhood thereof ; that the pursuer first raised the action against the defender Mr. Towers Clark, as the successor of the said Dr. William Clark in the superiority of the feu belonging to the pursuer, for damages in respect of the injuries above referred to, and after certain procedure in the action against Mr. Towers Clark, he raised another action against Mr. Towers Clark and the trustees of Mr. Adam, as the proprietors or owners of the coal and minerals, and also against the Broomfield Coal Company, as the lessees and tenants of the same, which actions have been conjoined ; that the ground of action in the petitions is laid upon the clause in the feu-contract of 1844 to William Simpson, granted by the author of the defender Mr. Towers Clark, who was at the time proprietor of both the surface and the minerals : Finds, with reference to the above findings, that by the reservation in the feu-contract of the coal, metals, and minerals in the ground conveyed, the said coal, metals, and minerals became a separate *tenementum*, and was capable of being transferred and feudalized, and that upon the said coal, metals, and minerals being sold to Messrs. Merry & Cunningham, the obligations in the feu-contract to William Simpson to pay the damages sustained in working the same was transferred against the disponees, and the obligation on the said Dr. Clark and heirs ceased, and that in the same way when the property of the coal and the power of working it came to be vested in the late William Adam, and now in the defenders his trustees, the obligation to pay the damage was transferred against them : Finds therefore that the pursuer is not entitled to claim from the defender Mr. Towers Clark, as the successor of Dr. William Clark in the superiority of the subjects, for any damage which the pursuer may have sustained since the beginning of the year 1881 in consequence of the underground operations in working the said coals and other minerals, and assoilzies the said defender from the prayer of both petitions : Finds with reference to the other defenders, the owners and lessees or tenants of the coal and minerals, that they are conjunctly and severally liable to the pursuer for any damages which he may have sustained in consequence of the said underground operations, but finds that as by the clause in the feu-contract founded on it is stipulated that 'the damages thereby occasioned shall be ascertained by arbiters mutually chosen for that purpose,' the present action is excluded ; therefore, so far as these defenders are concerned, dismisses the action, reserving to the pursuer to call

upon the said defenders to concur with him in naming arbiters in terms of the said feu-contract, and to the pursuer any competent remedy in the event of the said defenders failing so to concur : Finds the whole of the defenders entitled to expenses, appoints accounts thereof to be given in, and remits the same to Mr. James Gray, Auditor of Court, to tax and report, and decerns.

“WM. LUDOVIC MAIR.”

After setting forth the facts, the Sheriff says, “*Note*.—The first question is whether there is any liability against Mr. Towers Clark. I am of opinion there is not. It was contended for the pursuer that Mr. Towers Clark was liable *ex contractu* in virtue of the clause in the feu-contract above referred to. He might have been if, besides being the superior of the feu, he had been the proprietor of the coal and minerals. After the feu-contract was executed, and the *dominium utile* of the land was transferred to Simpson, Dr. Clark was proprietor of two estates. The one was the superiority of the land feued to Simpson, the other was the coal in these lands. These estates Dr. Clark was at full liberty to separate in any manner he thought proper. He was at liberty to convey them to different persons, or to retain the superiority and convey away the coal, or retain the coal and convey away the superiority. But when the estates came to be held by different proprietors, only one of these proprietors could be liable in payment of damages, and as the superior of the lands had no connection in such a case with the coal, he could not be liable for the damage done by the owner of the separate estate. It is a mistake to say that the reserved right of the coal was one of the rights of superiority. Among all the rights laid down by the institutional writers as belonging to superiors, the right to the coals in the lands of their vassals was never included. Indeed, had it not been for the express reservation in the feu-contract, the coals in the lands would have been conveyed to the vassal. Can the circumstance, therefore, of Dr. Clark having reserved the coal when he feued out the land make the rights to the coal one of the rights of superiority? It certainly cannot. By reserving the coal it remained the property of Dr. Clark, who also continued superior of the lands, but the coal did not become one of the rights of superiority. The two estates remained distinct, and the one was not a part or pertinent of the other. These estates are now in separate proprietors. It would be absurd, therefore, to make the proprietor of the one liable for the acts of the proprietor of the other. The proprietor of the coal is entitled to work the coal—that is to say, to enjoy his estate—and he is bound to pay the surface damage. He holds the estate *sub modo*, and the *modus* is, that if the coal is wrought, the damage must be paid. That obligation attaches to the proprietor alone, and the superior of the lands has nothing to do with it. The question here raised was decided in the case of *Simpson v. Kerr* (1792, 3 Paton’s Appeals, 238), and no case was cited by the pursuer adverse to that decision. See also *Aspden v. Seddon* (1876, 1 Excheq. 496). As to the other defenders, the coalowners and the lessees, they are liable conjunctly and severally for any damages the pursuer may instruct he has sustained by the underground operations. It is, I think, no answer for the coalowners (and by them is meant the proprietors) to say that they have leased the coal to the Broomfield Coal Company. It may be that the Broomfield Coal Company were really the parties who were the cause of the damage, but in a question with the pursuer under the clause in the feu-contract which is the basis of his action, they are both liable to him, conjunctly and severally (*Hamilton v. Turner*, 1867, 5 Mac. 1086). The feu-contract, however, stipulates the way and manner in which the damage is to be ascertained, namely, by arbiters mutually chosen for that purpose. It is not pretended by the pursuer that this course was proposed by him, so far as these defenders were concerned, and not having done so, the present action is, in my opinion, excluded. But it was maintained that the clause as to arbitration was inoperative in respect that arbiters were not named. This, however, is a fallacy. This is not a case in which a clause is found in a contract referring to arbiters not named any

questions or disputes which may arise in the execution of the contract. In such a case it has been held over and over again that the reference is abortive and cannot be enforced. The distinction between such a case and cases like the present is pointed out in several cases. The reference here is part of the contract, and is necessary to liquidate the obligation come under by the contract. Lord Fullerton in the case of *Smith* (28th February 1843, 5 D. 749) says, 'Where the reference is essential to liquidate the obligation come under by the party, it is good though to a person not named. If not, what would become of the obligation? Nothing is fixed by the contract, and if it is not to be fixed by a reference, there would be no obligation at all. There is no authority against such a reference.' See also Bell on Arbitration, secs. 145 to 156, and the cases there cited. W. L. M."

Act.—Thomas Clark.—*Alt.*—Towers Clark and others.

Sheriff LEES.

WILLIAMSON v. TAIT.

Landlord and tenant—Removal of debris of burned subjects.—This was an action by a landlord to have his tenant ordained to remove the debris of his stock and plenishing which had been destroyed by a fire. The Sheriff-Substitute pronounced the following interlocutor, which was acquiesced in :—

"Having considered the cause, Finds as regards the debris of the stock and other effects which belonged to the defender, and were situated in the mill at Bridgeton, and on the ground adjacent thereto let by the pursuer to him, and which effects were accidentally injured or destroyed on the occasion of the fire at said mill on 21st May last, that the rights and obligations of the parties *inter se* are as follows : (1) That the defender was entitled to remove the whole or any part of said debris ; (2) that he was not bound to remove it unless requested by the pursuer to do so ; (3) that on being requested to do so he was bound to remove said debris, so far as its removal could practically be attained without the toil of shifting the debris of the pursuer's property ; (4) that to such extent as the two classes of debris were intermixed, the defender was bound, on the pursuer's request, to concur with him in the joint removal of the debris, the expense being apportioned as fairly as could be managed between the parties in proportion to the trouble and expense the removal of the debris belonging to each of them occasioned ; (5) that on the refusal of the defender to remove the debris, as aforesaid, or concur in its joint removal, if such were necessary, the pursuer was entitled at once to remove the whole, and to recover from the defender his proportion of the cost of such removal ; and (6) that if the pursuer refused (as is alleged) to allow the defender to execute his part, such refusal may, unless it be satisfactorily accounted for, amount to a waiver by the pursuer of his equitable right to require the defender to remove his debris: And in respect of the novelty of the point raised and its pecuniary importance to the parties, and that an authoritative expression of opinion in regard to the views above stated may obviate the necessity of a proof, and be of service on the recurrence of a like case, grants leave of appeal to either party. J. M. LEES.

"*Note.*—So far as can be found there is neither dictum nor decision on the above question ; and though one would expect that the matter is settled by practice, neither party asserts that it is so.

"The circumstances of the case may be stated in a single sentence. The pursuer let a mill and the adjoining ground to the defender for seven years, and during the currency of the lease a fire occurred, which, by the destruction of the subjects, has put an end to the lease, and has mingled the debris of the parties in great measure so completely that neither can remove his own share feasibly without shifting a great deal of the other's.

"At first each party asserted that the obligation to remove the debris lay solely

with the other. Eventually the pursuer was advised that such a position was untenable, and he accordingly only asks that the defender shall remove his share. The defender, however, contended that he was not bound to remove any part, though he had to admit in debate that he considered himself entitled to remove any part. It would be somewhat anomalous if such were his rights. But, as a rule, our law did not favour alleged rights of the heads-I-win, tails-you-lose character. I think equity or common-sense, whichever it be called, must rule the matter somewhat in the way I have stated.

"Practically what I have done is to apply the Roman law of *commixtio* in a converse shape. In the Institutes the illustration given is the accidental mixture of two quantities of wheat, and the text of the Institutes (II. 1. 28), after negating the idea of common property, concludes thus: 'Sed si ab alterutro vestrum totum id frumentum retineatur, in rem quidem actio pro modo frumenti cujusque competit: arbitrio autem judicis continetur ut ipse aestimet quale cujusque fuerit.' And if to this rule be applied the maxim 'Cujus est commodum ejus debet esse incommodum,' authority will be evolved for some of the propositions I have stated.

"I agree with Mr. Downie in thinking that he is not bound to call the person who is said to have bought the salvage. With him the pursuer has nothing to do. J. M. L."

Act.—Downie and Aiton.—Alt.—M'Kay and M'Intosh.

SHERIFF SMALL DEBT COURT OF LANARKSHIRE.

Sheriff SPENS.

GOVAN, ETC., HOSPITAL COMMITTEE v. MURDOCH.

Public Health Act—Servant's illness—Hospital.—In this action the pursuers claimed from the defender £6, 6s. for treatment of his servant, Christina M'Kinnon, in their hospital, and 3s. for the hire of a conveyance to bring her. The somewhat peculiar circumstances of the case are detailed in the Sheriff-Substitute's judgment, which was as follows:—

"This is an action raised by what is described as the Govan and Kinningpark Combination Hospital Committee against a dairyman in Rutherglen. All objection to the title to sue was expressly waived by the defender's agent, although it is not difficult to see that various objections could be taken to the instance. The claim is made in these circumstances. It appears that upon the 19th of September the defender's servant took ill. A doctor who was called in declared it to be scarlet fever. The girl then implored her master to take her to her aunt's, who lived in Govan. This aunt took her in, she having been driven to the house in a cab, and the fact of the patient suffering from scarlet fever was not notified to the cab proprietor or cabman. The aunt had two lodgers. The fact of the patient having been removed came to the knowledge of the sanitary authorities, and at their instance the girl was removed to the hospital on Wednesday, 21st September—two days after her arrival at her aunt's house—where she lived only a few hours. This action has been raised against the defender, as the master of the girl, upon the ground that he is liable for her reception into the hospital, and the charge of six guineas, which is made therefor, is stated to be the invariable charge which is made for every patient, whether their treatment requires three months, or, as in the present case, only an hour or two. I am of opinion that the defender is entitled to absolvitor. In the first place, it appears to be the law that a master is not bound to provide medical attendance for his domestic servant (Fraser, Master and Servant, third edition, p. 127), and the theory that he is so obliged is, as I understand, the basis of the action; but, in the second place, there is no contract between the defender and the Committee. The answer to that may be, 'You, the master and guardian of the servant, placed her where she had no

right to be, and necessitated her being removed by the Local Authority, and therefore for the charge for keep there is liability.' It seems a sufficient answer to this contention to point out that there is no Public Health Common Law—it is altogether the creation of statute. There was nothing at common law to prevent defender acceding to the servant's request, which was not an unnatural one in the circumstances, to take her to her aunt's house. It was an offence under the Public Health Act of 1867, and for that offence the defender was charged at the instance of the sanitary authorities, and required to pay the statutory penalty; but if no breach of common law, then the defender cannot be required to pay for the action of the sanitary authority without communication with him. In other words, he is in no way responsible at common law for the reception and treatment of the patient. In the third place, even if it could have been held that there was a ground of liability for the reception and treatment in hospital by a person who had made no contract with the hospital authority, such liability could only have amounted to what was the *quantum meruit* of the treatment and attendance. In this case the poor girl only lived an hour or two after arriving at the hospital. I made inquiries at the proof as to whether the removal could not have been the cause of death, and was glad to be satisfied that while the exhaustion consequent upon the removal may have accelerated death, yet there were symptoms present in the girl's case which made it a hopeless one. This is satisfactory, for a grave responsibility would have rested upon the sanitary authorities if to the removal death could be attributed. The girl, however, survived her removal but an hour or two, and the *quantum meruit* of her admission and treatment could not be estimated at above a few shillings. There was a further claim of 3s. for a conveyance, which of course falls with the principal claim."

No expenses were allowed.

Act.—Macdonald.—Alt.—Clark.

SHERIFF COURT OF PERTSHIRE.

HOWIE v. MELVILLE.

Contract—Jurisdiction.—Melville, who resided in Glasgow, was proprietor of a property in Rattray, Perthshire. He contracted with a mason and a wright for the erection of a house. Disputes having arisen as to their accounts, both brought actions in the Sheriff Court at Perth. The defender was cited whilst in Perthshire. He objected to the jurisdiction, which was repelled by the following interlocutor:—

"Perth, 14th December 1881.—Having heard parties' procurators and made avizandum with process and debate, In respect that the contract for the work was made and the work performed within the county of Perth, repels the defender's plea and sustains the jurisdiction, and orders the case to the roll that the record may be adjusted and closed.

HUGH BARCLAY.

"*Note.*—The Sheriff-Substitute has felt this question to be one of considerable delicacy and difficulty. The rule of law is undoubtedly that a creditor must follow his debtor and sue him in his own jurisdiction. This rule, however, admits of exceptions. Where a contract is made in a county to do a certain work, the Courts of that county can enforce performance of the contract. In this case the work has been performed, and the tradesman sues for the price of the work. The place of contract and performance must, in the absence of stipulation to the contrary, be held the place of payment for the work. A test question might arise thus. Suppose that there had been two or more proprietors jointly liable, resident in different localities, would the action only be competent in the Supreme Court, and what if the sum had been less than £25? The Sheriff-Substitute has anxiously gone over all the decisions cited on both sides. Some of them were cases where the defender was a foreigner, and it was

there important that he was cited within the jurisdiction. The defender was thus cited, but the Sheriff-Substitute places little or no weight on that fact. Citation implies *prior* jurisdiction, with the exception of persons without any domicile. There is no doubt that if convenience can be allowed to form an element on the question of jurisdiction, this is the proper Court. It is a strong circumstance in support of the jurisdiction, seeing that all witnesses must be resident within the locality.

"Cases cited: *Pirie & Sons v. Warden*, Feb. 20, 1867, 5 Macpherson, 497. *Kermack v. Watson*, July 7, 1871, 9 Macpherson, 985, or 43 Jurist, 542. *Logan v. Thomson*, Jan. 24, 1859, 31 Jurist, 1873, or 3 Irvine, 323; *McGlashan's Sheriff Court Practice*, p. 71; *Dove Wilson*, p. 67; *Campbell on Citation and Diligence*, *voce* Jurisdiction. H. B."

The Sheriff-Substitute granted leave to appeal to the Sheriff, who on Feb. 11, 1882, affirmed the interlocutor and found the defender liable in the expense of the appeal.

Notes of English, American, and Colonial Cases.

SALVAGE—Derelict.—A derelict ship was boarded by a party of five men, who navigated her for four days and then signalled a passing ship for help. On their signal being answered they abandoned the derelict ship and took refuge on board the other ship. The latter ship put some hands on board the derelict and towed and stood by her until further help was obtained, and she was got into harbour:—*Held*, that no salvage was earned by the party who first boarded the derelict.—*The Killeena*, 51 L. J. Rep. (P. D. & A.) 11.

RAILWAY COMPANY.—*Passengers' fares*—"Rates, tolls, and charges"—*Absence of mile-posts on railway*—*Construction of inconsistent Railway Acts*—*Equalization of fares over the whole system of amalgamated railways*—*Great Western Railway Company's Acts*—*Railway Clauses Consolidation Act, 1845* (8 Vict. c. 20), *secs. 94 and 95*.—By the original Act authorizing the construction of a railway the company were empowered to demand certain tolls for the carriage of passengers and goods, and upon payment of the tolls demandable all persons should be entitled to use the railway. The company was required to set up mile-posts along the whole line at the distances of one-quarter of a mile from each other, and it was enacted that "no tolls should be demanded or taken by the company during any time at which the mile-posts should not be set up and maintained." Plaintiff having travelled in one of the company's trains along their line at a time when two of the mile-posts had been removed, sued to recover the fare which he had been compelled to pay for his journeys, on the ground that it was not, by reason of the above enactment, demandable:—*Held*, that he could not recover, because the provisions as to mile-posts applied only to cases where persons or goods are being conveyed by persons other than the company upon the line, and not where the company conveys in its own carriages, and the plaintiff was not therefore "a person using the railway" within the meaning of the Act.—*Brown v. The Great Western Railway Co.*, 51 L. J. Rep. (Q. B. D.) 156.

By their original Act a railway company had a scale of authorized charges for passengers according to distance. By a subsequent Act the company were empowered to make a short extension line, and charge a lump sum for passengers over that extension. A still later Act allowed the company to amalgamate with another existing company on condition of their reducing their charges to the same scale as that of the other company. That scale was a 1d. a mile for each third-class passenger. The amalgamation Act, however, said that a fraction of a mile might be charged for as a mile. Plaintiff travelled over the company's line, including the short extension, and was charged a sum

which was at the rate of more than 1d. per mile calculated over the whole distance travelled, but of not more than 1d. per mile over the distance exclusive of the extension, assuming that the company could also charge the lump sum for the latter piece. On action brought to recover the excess above 1d. per mile over the whole distance,—*Held*, that the later Act must be taken to have repealed the earlier one authorizing the charge of the lump sum; and that the company were only entitled to charge 1d. per mile calculated over the whole journey (but that they might reckon a fraction of a mile as one mile), and that the plaintiff ought to have judgment for the difference.—*Ibid*.

CHEQUE—*Payment by post-dated cheque—Bankruptcy of payee before date of payment—Notice—Obligation to stop cheque—Bankruptcy Act, 1869, s. 94, sub-s. 3.*—Between the giving of a post-dated cheque in payment of a debt then due and the date at which it was payable, the drawers received notice of the bankruptcy of the payee. The drawers did not stop the cheque, and the proceeds were received by the bankrupt:—*Held* (reversing the decision of Bacon, C.J.), that the giving of the cheque was a protected transaction, within the meaning of the Bankruptcy Act, 1869, s. 94, sub-s. 3, and that there was, consequently, no obligation on the drawers to stop payment of it.—*Ex parte Richdale; in re Palmer* (App.) 51 L. J. Rep. Ch. 462.

COPYRIGHT—*Reproduction of picture in chromo—Licence to reproduce imitation of picture—Assignee of copyright—25 and 26 Vict. c. 68—Registration of licence.*—The assignees, duly registered, of the copyright in a picture sold to the plaintiff the sole right to reproduce it in chromo for two years. This agreement of sale was not registered. While it was in force the defendant published the same subject by chromo-lithography, independently, not directly copying plaintiff's chromo-lithograph. The plaintiff's chromo-lithograph plate was not engraved with the name of the proprietor or date of publication, as required by the Act 15 and 16 Vict. c. 12, s. 14. It was objected that the plaintiff could not recover damages from the defendant for piracy of his copyright, because, first, the plaintiff's chromo was not duly engraved; and secondly, there was no registration of the assignment to the plaintiff within 25 and 26 Vict. c. 68. But, *held* by Mathew, J., on the first point, that the copyright in the original picture had been violated by the production of the defendant's chromo-lithograph, which was not simply an imitation of the plaintiff's chromo-lithograph; and, on the second point, that the plaintiff was not an assignee of the copyright within the meaning of the Act, but a licensee to reproduce an imitation of the picture, as to whose licence no registration is required.—*Tuck v. Canton*, 51 L. J. Rep. (Q. B. D.) 368.

CHARTER-PARTY—*General ship—Lien for freight—Notice.*—When a person without notice of any charter-party between the shipowner and the charterer ships goods on board a vessel which is advertised as a general ship by the charterer only, such goods are not subject to a lien which may be reserved by the charter-party to the shipowner in respect of overdue freight; and under such circumstances an intending shipper is not bound to inquire as to the existence of a charter-party.—*The Stornoway*, 51 L. J. Rep. (P. D. and A.) 27. *Peck v. Larsen* (40 L. J. Rep. Ch. 763; Law Rep. 12 Eq. 378) approved.—*Ibid*.

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CAPACITY TO MARRY.

(Continued from p. 303.)

II.

THE peculiar political construction of the United States of America, and the diversity of municipal systems which have arisen out of it, have, more especially of recent years, enriched her jurisprudence with numerous decisions illustrative of the conflict of laws, with the natural result of the emergence of several able commentators. American Law is naturally based on that of the mother country, which the colonists took with them, and *Male v. Roberts* and *Scrimshire v. Scrimshire* are leading authorities there as in England, while the principle of these decisions is affirmed by judges and institutional writers (with some exceptions to be after referred to) with a consistency and uniformity which have been departed from in the old country.

Chancellor Kent (Commentaries on American Law, tenth edition, ii. 63) lays down the broad rule, "As the law of marriage is a part of the *jus gentium*, the general rule undoubtedly is that a marriage valid or void by the law of the place where it is celebrated is valid or void everywhere." After noticing the doctrine of evasion of the law of domicile, and quoting *Compton v. Bearcroft* as establishing its rejection by the law of England, he deduces the following proposition: "The principle is that in respect to marriage the *lex loci contractus* prevails over the *lex domicilii* as being the safer rule, and one dictated by just and enlightened views of international jurisprudence." But not content with stating this as the law of America, he makes the sweeping and inaccurate assertion that it is "part of the *jus gentium* of Christian Europe."

Story (Conflict of Laws, sec. 113) is at one with Kent. "The

general principle certainly is, that between persons *sui juris*, marriage is to be decided by the law of the place where it is celebrated. If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere." This doctrine he declares to have received the most deliberate sanction of the English and American Courts. This was written before *Brook v. Brook*, but the latest edition is subsequent to that decision, and is referred to by the editor, Mr. Bennett, who relegates the marriage there to the category of incestuous, and justifies the decision on the ground that each nation must fix for itself what shall be included within the limits of this category. And from this he deduces the principle that the rule of the dependence of the validity of the marriage on the *lex loci contractus* required the qualification, that when a certain marriage was expressly forbidden by the laws of the country, these laws followed its subjects everywhere, and that "the comity of nations does not require that a nation should recognise as valid every marriage which is valid *lege loci contractus*"—all of which means that any one attempting to sit simultaneously on two stools so far apart as the rule of Story and the decision in *Brook v. Brook* must needs come to the ground in confusion. To invoke the comity of nations for such a doctrine is manifestly inept as soon as it is judged by its possible results, for, according to this doctrine, Brook was unmarried in England, and his children illegitimate, while married in Denmark by Mr. Bennett's own rule of *locus regit actum*—truly a lamentable outcome of the comity of nations. And the like, *mutatis mutandis*, would be the state of matters arising from its application to the converse circumstances in the case of *Sottomayor v. De Barros*. The English Courts ought to have upheld the validity of the marriage *lege loci contractus*, while the Portuguese Courts would have held it null wherever celebrated as incestuous by their law, which followed its subjects abroad. To this unfortunate state of matters—married in one country, unmarried in another—there is open to the advocate of Story's rule along with the qualification of his editor, positively no alternative but the adoption of the opposite principle, that of the dependence of the validity of marriage as regards relationship on the *lex domicilii*. It is a trite observation to say that the true intent of the comity of nations is to obviate the possibility of such a result, not to produce it.

It is a curious instance of the perpetuation of an error in assigning its proper place in the progress of jurisprudence to a particular decision, that both Kent and Story should have followed Burge in regarding *Conway v. Beazley* (*supra*, p. 301) as an example of matrimonial capacity fixed by personal law, and in contradiction to their own doctrine, against which it therefore behoved them to direct the artillery of their argument, and solemnly to demolish to their own satisfaction.

The case of *Inhabitants of Medway v. Inhabitants of Needham*

(16 Mass. 157), in the Supreme Court of Massachusetts in 1819, has been treated by American jurists, including Kent and Story, as a leading authority in this branch of the law. The question was the vexed one—not the least of the social difficulties which have arisen out of slavery—of the intermarriage of white and black. A marriage between a coloured man and a white woman was then prohibited by statute—now repealed—in that state. The parties crossed over into the neighbouring state of Rhode Island, where no such prohibition prevailed, and were married there, with the purpose of evading the prohibition of the law in Massachusetts. The efforts of Ishmael Coffee and his white bride towards the amalgamation of races do not seem, however, to have resulted in a happy union, for the question of the validity of their marriage arose in a contention between two districts as to their alternative liability for the poor's maintenance of his wife. The marriage was held valid. The law of England is referred to for the rule of decision, but the American Court, while laying down the rule as to evasion thus broadly, declared it repugnant to the general principles of law relating to contracts, for a fraudulent evasion of the law of the country where the parties have their domicile could not, it maintains, except in the contract of marriage, be protected under the general principle. For example, parties intending to make a usurious bargain in which a higher rate of interest than what is lawful by the laws of their domicile is stipulated, cannot, by passing into another territory where there is no such restriction, make a contract which their domestic *forum* would hold valid. The expression of opinion here is not very definite, but we take this to mean a contract having its proper seat—according to whatever criterion the law of Massachusetts may prescribe for it, say its *locus solutionis*—there, and thus falling to be judged by the laws of Massachusetts. "The exception in favour of marriage," the opinion proceeds, "so contracted must be founded on principles of policy with a view to prevent the disastrous consequences to the issue of such marriage as well as to avoid the public mischief which would result from the loose state in which people so situated would live." The plea is the expediency of the rule.

The authority of this decision does not seem to have been impugned by the Courts of at least any of the Northern States. But the more vehement and abiding race antipathies of the South have prolonged the extinct combat of arms into a conflict of laws with the North in this matter, and have furnished a series of quite recent decisions to a contrary effect in the tribunals of several of the former slave-holding states. This has occurred in Tennessee, North Carolina, Virginia, and Louisiana. The facts in each case are, *mutatis mutandis*, a repetition of those in *Medway v. Needham*. In each of these states there appear to exist statutes prohibiting intermarriage between white and black. The Tennessee case (*State v. Bell*, 32 Am. Rep. 549) was in 1872, but a perusal of the

judgment, which is a short one, leaves an impression of little save the evident eagerness of the Court to have the decision—that of nullity—speedily pronounced, and its determination to do so at all hazards. In the North Carolina case (*State v. Kennedy*, 22 Am. Rep. 683), a negro and white woman, both domiciled there, went into South Carolina, where the prohibition does not exist, went through a ceremony of marriage there, and immediately returned home. The primitive Puritan law, making illicit converse of the sexes, where neither party is married, a criminal offence, which still stands on the statute-book of several of the States of the Union, appears to be furbished up as an occasional weapon with which to strike at what, in the language of the American reports, is called “miscegenation”—it is not to be found in Webster—which appears to mean cohabitation, *under forms of marriage*, of white with black. However that may be, the happy couple in question, on their return from the honeymoon, were served with an indictment of “fornication and adultery,” on which they were convicted in the local Court, the judgment being affirmed by the Supreme Court of the state on appeal. The judgment, particularly in the words I have italicized, lays down the principle of the *lex domicilii* with sufficient explicitness. “As to the formalities of the marriage the *lex loci* will govern. But when the law of North Carolina declares that all marriages between negroes and white persons shall be void, *this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina*, and we conceive that it is immaterial whether they left the state with the intent to evade its law or not, *if they had not bonâ fide acquired a domicile elsewhere at the time of the marriage*. . . . A law like this of ours would be very idle if it could be avoided by merely stepping over an imaginary line.” This is precisely the doctrine of *Brook v. Brook*, to which indeed it is there referred. The date of this case is 1877. The Virginia case (*Kinney v. The Commonwealth*, 32 Am. Rep. 690) was in the following year. With the substitution of Virginia and District of Columbia for North and South Carolina, the facts are the same as those of *Kennedy’s* case, and the suit is again a criminal one, with a variation, however, in the *nomen juris* of the offence, it being here styled “lewd and lascivious cohabitation.” *Brook v. Brook* is again laid under contribution as affording a ruling in principle for the case, the ground of judgment being that the marriage of white and black is absolutely forbidden in Virginia as contrary to “social order, public morality, and the best interests of both races.” The following paragraph, near the close of the judgment, seems worthy of reproduction: “The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished Southern civilization, under which two distinct races are to work out and accomplish the destiny to which the Almighty has assigned them on this continent,—all require that they should

be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them, should be prohibited by positive law to be subject to no evasion." These be indeed brave words; but did not the learned judge pen them with his tongue in his cheek? Let the sentiments be granted personally sincere: as those of a mouthpiece of a "cherished Southern civilization" which has sanctioned an amount of "miscegenation" that, in a few generations, has bleached a vast number of the black race, within the bounds of its operation, more or less white, their expression is certainly curious. It is of course the part of a judge to administer the law as he finds it, but his reasons are fair matter of comment. When the black man was a chattel, marriage between bond and free was socially out of the question; but now that the negro is the political equal of his former master, the rhetorical enunciation of such *rationes decidendi* is a judicial solecism. The daughters of the Southern aristocracy need no prohibitory statute to restrain any inclination to enter into marriage-bonds with the children of their fathers' slaves—nor their brothers to be forbidden to seek sable brides—and the negro is never likely to rise into the higher social grades in America, and attain to a *connubium* with their members; but that a white man or woman of the humbler ranks who fancies he or she can find wedded bliss and a sphere of mutual helpfulness in an honourable monogamous union with another whose skin is more or less dusky in hue, should find their laudable efforts to achieve it barred by the pains of a criminal statute judicially administered to them with tremendous invocations of civilization, destiny, nature, and the Supreme Being, is unworthy of any intelligent civilization at all. Slavery favoured the blending of the races by illicit intercourse: freedom forbids it under forms of marriage. A law, which was never enforced to restrain the former, is now strained beyond all limits of equity to forbid the latter!

Unfortunately there does not appear to have emerged in the Southern tribunals a case of the converse—a parallel of the circumstances of *Sottomayor v. De Barros* in England. In the case of *State v. Ross* (22 Am. Rep. 678), also in North Carolina, decided in the same year as *State v. Kennedy*, a white woman resident in North Carolina was married in South Carolina to a negro domiciled there. The parties remained in the latter state for some months after the marriage, then crossed into North Carolina, where after three years' residence they were criminally indicted for fornication and adultery. It was not shown that at the time of the marriage the intention had been formed of a subsequent change of residence to North Carolina, so that the question of evasion of domestic law on the wife's part did not arise. On the point of her domicile, however, there appears to have been some confusion in the mind of the learned judge, for, not content with the non-emergence of the question of evasion on the facts, he tries after another mode of getting rid of such hypothetical difficulty by invoking the univer-

sally-established rule of the law of domicile, that the wife's domicile is that of the husband. This is to reason in a circle, for the principle could only operate if the marriage were a good one, which is the question he is trying. Looking at the rubric along with the report, it would seem that the only way to take it is, that the woman, having left home with intent to be married and to reside in another state, had abandoned her domicile in North Carolina. Mr. Bishop at all events (i. 375) and Wharton (sec. 159) take the case on the footing of both domiciles being in South Carolina. The parties were acquitted. The *rationes decidendi* are undeniably sound principles of International Law. "It is impossible," says the judgment, "to identify this case with that of an incestuous or polygamous marriage admitted to be such *juris gentium*. The law of nations is a part of the law of North Carolina. We are under obligations of comity to our sister states. We are compelled to say that this marriage, being valid in the state where the parties were *bond fide* domiciled at the time of the contract, must be regarded as subsisting after their immigration here." The judge then notices the validity of the marriage according to the *lex loci contractus*, and refers to *Scrimshire v. Scrimshire* for the rule on that point. He apparently rests his decision on both principles, without distinguishing that, though here coincident, they might in other circumstances prove divergent and incompatible, as, for example, had the marriage taken place in North Carolina, where the *lex loci* would have forbidden it, while the *lex domicilii* would have allowed it. But from the coincidence here of the *locus domicilii* and the *locus celebrationis* the case goes no further than to show that race antipathy in the state where it was decided was not sufficiently strong to blind the judicial mind to the first principles of Private International Law. But that anything so elementary as the doctrine enunciated in the above passage should be laid down by the judge of a Supreme State Court, as if it could be seriously a subject of contention, is instructive as showing the power and tendency of this antipathy in the South to taint the springs of justice.

If such be the reflection suggested by the above passage, a case quoted by Bishop and Wharton, but which I have not been able to find in the series of American Reports, cannot be otherwise regarded than as putting the precedents of that tribunal, on this branch of the law at least, beyond the pale of the *jus gentium* altogether. In this case (*Dupré v. Boulard*; see Bishop, i. 375) a marriage had in France, one of the parties to which was of colour, but both domiciled in France, was declared invalid in Louisiana. The *locus domicilii* is an inference from a note to Wharton (p. 227), and from the fact that the case appears to have occurred before the abolition of slavery. If the inference is unwarranted, the foregoing expressions must of course be modified, and the case falls into the class of those already cited.

But the so-called miscegenation of white and black is not the only aspect in which this branch of jurisprudence is presented to us in the American Reports. The laws of some of the states forbid, under penal consequences, the guilty spouse, after divorce for adultery, to marry, not, as in Scotland, the *particeps criminis* only, but any third party, during the lifetime of the former spouse. This is the case in Massachusetts, where, however, a second marriage may be made on permission granted, on application, by the Court. Joseph N. Lane, a domiciled citizen of that state, was divorced from his wife for his own adultery. He thereafter, while she was still alive, married again in New Hampshire, continuing to have his domicile, and resuming his residence with his new wife, in Massachusetts. The case was adjudicated on the assumption of the validity of the marriage by the *lex loci*, though the fact does not seem to have been formally proved. The statute of Massachusetts applicable to these circumstances, after enacting its substantive prohibitions, provides further, "When persons resident in this state, in order to evade the preceding provisions, and with an intention of returning to reside in this state, go into another state or country and there have their marriage solemnized, and afterwards return and reside here, the marriage shall be decreed void in this state." The conclusion reached by the Court is, "A marriage which is prohibited here by statute, because contrary to the policy of our law, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this Commonwealth, and have gone abroad for the purpose of evading our laws, *unless the Legislature has clearly enacted that such marriage out of the state shall have no validity here.*" The marriage was held good on the ground of validity *lege loci contractus*, there being held to have been no proof of intent to evade the statute. A perusal of the narrative of the report (*Commonwealth v. Lane*, 18 Am. Rep. 509) indeed tends to produce the impression that such intent was without much difficulty to be found in the facts of the case, and that the finding to the opposite effect was adopted as a means of escape from pronouncing a judgment in terms of the questionably sound doctrine of the italicized sentence of the opinion. The judgment contains a pretty full citation of authorities, English and American. The Court avoids the error of attempting to reconcile *Brook v. Brook* with this view, but subjects this famous decision to an unfavourable criticism of considerable length and elaboration, and while, expressing respect for the eminent tribunal which pronounced it, rejects its authority. This is entirely consistent with *Medway v. Needham*, and the case, though usually quoted by American writers as the leading one—probably since it contains the fullest discussion on the subject—ranks merely as one of a consistent series of decisions in the same Court; for before the amending statute containing the above clause was passed, but while the prohibition existed under an earlier Act, without this fencing provision, the Courts of Massachusetts had

held a marriage valid under precisely similar circumstances, where deliberate intention to evade was shown (*Putnam v. Putnam*, 1829, 8 Pick. 433).

It is interesting to trace the progress—backwards—of Massachusetts law on this subject through two other cases, *West Cambridge v. Lexington*, in 1823 (1 Pick. 506), and *Greenwood v. Curtis*, in 1810 (6 Mass. 358). In the former—one of that class of cases which lead so frequently to the discussion and determination of various and important questions of law far removed from their initial motive—a dispute as to a poor's settlement, it was held that the children of the second marriage of a guilty husband divorced in Massachusetts, contracted in New Hampshire, where no impediment existed, had their father's settlement as legitimate offspring. It appears that the divorced and remarried husband had remained resident in New Hampshire at least during the lifetime of his former spouse. The opinion puts the question, afterwards answered in the negative in *Commonwealth v. Lane*, whether, had he returned and cohabited with his second wife in Massachusetts, still living the first, he would have been indictable for polygamy, and a pretty distinct indication of opinion is given in favour of a probable affirmative reply. In the other case—an action on a foreign contract for the delivery of slaves—the now established doctrine appears as an *obiter dictum*, seemingly for the first time, since the case is found subsequently cited as the proto-authority. In the law of Scotland—as far at least as purely judicial authority goes—the subject has really never got beyond the stage at which it is presented here.

Though thus settled in Massachusetts, this was, till only last year, still an open question in the Courts of New York, there being decisions both ways, the balance, however, evidently leaning in the direction opposed to the doctrine of the Massachusetts case. The point appears, however, to have been now finally adjudicated there also by a judgment of the New York Court of Appeals (*Van Voorhis v. Baintnall*, 24 Albany Law Journal, 348). The case arose out of a question as to the succession of a child by the second wife. The Courts of the first and second instance, holding themselves bound by precedent, both found the child illegitimate by reason of the nullity of his father's second marriage. The case was reversed in the Court of last resort. The grounds of judgment are that the New York statute did not expressly prohibit a second marriage out of the state (on the analogy that penal laws cannot reach offences committed beyond the limits of the territory unless they are expressly declared to do so), and contained no clause as to evasion of the *lex domicilii* similar to the Massachusetts provision. This is entirely consistent with the Massachusetts decisions.

The same principle was affirmed where like circumstances fell to be adjudicated on in the converse *forum*—that of the place of celebration in the case of *Dickson v. Dickson* (note to *Commonwealth v. Lane*, 18 Am. Rep. 522), where a woman divorced for her

fault in Kentucky evaded a like domiciliary prohibition by crossing into Tennessee and marrying there. The Courts of Tennessee held the marriage good.

The reports of Kentucky furnish an example of a solution of the question under still another aspect (*Stevenson v. Gray*, note *ut supra*). Nephew and uncle's widow are within the forbidden Kentuckian degrees, but without those of Tennessee. Kentuckians so related were married in the latter state, and thereupon returned home, and the Courts of Kentucky pronounced the marriage good.

The Massachusetts case of *Sutton v. Warren* in 1845 (see Bishop, i. 117 and 377), in which a marriage between a man and his mother's sister, entered into in England, while both parties were domiciled there, before the passing of Lord Lyndhurst's Act (and so only *voidable* by sentence of the Court, not void *ab initio*, as it would be now), was, in a collateral proceeding—not a suit of nullity—held valid in Massachusetts, seems to call for a notice here. Readers of *Brook v. Brook* will remember the vehement attack made on this decision by the Lord Chancellor, in which he declared it to have proceeded on a total misapprehension of the law of England. Mr. Bishop devotes a note (p. 324) to a defence of the American Court. The merits of the controversy are beside the present discussion, for the judgment on the facts as they were taken by the American Court went no further than that a marriage, good both *lege domicilii* and *lege loci*, was good elsewhere. The curious anomaly of the result lies in the fact that such a marriage is absolutely void by the *lex fori*.

In the recent case of *Milliken v. Pratt* (28 Am. Rep. 242), in the same state, the wider question of the criterion of capacity in general came under the review of the same learned judge, who delivered the opinion in *Commonwealth v. Lane*. The judgment contains a full review of authorities up to *Sottomayor v. De Barros*, the dictum of Justice Cotton being repudiated as entitled to little weight there. The action was on a contract of guaranty, made in Maine, where it was valid, by a married woman domiciled in Massachusetts, where it was then, but would not be now, invalid for coverture. The point actually in controversy was of course that of general capacity to enter into an ordinary commercial contract; but the repudiation of the English *obiter dictum* is there expressly directed, *obiter*, to the question to which the English decision furnished an answer—capacity to contract marriage.

The works of only two contemporary American writers on this subject have come within my reach—those of Bishop and Wharton. The former approaches the subject from the municipal, the latter from the international point of view. Mr. Bishop (*Marriage and Divorce*, sixth edition) devotes a chapter to "The Conflict of Marriage Laws as to the Inception of the Status." From an international point of view his discussion of the subject is raised on too limited a basis of comparison of differing national systems, and his conclu-

sions are thus drawn from too narrow premisses. His citations from English, Scottish, and American sources are copious, but he does not travel beyond the limits of Anglo-Saxon jurisprudence. He declares unambiguously for the *lex loci contractus* as the criterion of capacity, on the ground of simplicity and expediency, with no qualification on the head of evasion of the *lex domestica* or otherwise. "A marriage valid by the law of the country in which it is celebrated, though the parties were but transient persons, though it would be invalid entered into under the same formalities in the place of their domicile, and even though contracted in express evasion of their own law, is good everywhere." He claims this as the law of England, and goes back to *Scrimshire v. Scrimshire* for the rule as carried forward in *Simonin v. Mallac*. The converse he takes as also sound doctrine, that a marriage invalid where celebrated is invalid everywhere. He will not allow an exception created by an express prohibition of the domestic law, and this leads him to quote with disapprobation the clause of the Massachusetts statute above recited, which he regards as a departure from the prevailing American doctrine. On this point he says, "In reason laws prohibitory of particular marriages are, when declaratory of the mere policy of the state enacting them, and not in accord with the universal sentiment and practice of Christendom, local in their nature, having in international jurisprudence no force beyond the territorial limits of their own state." Instead of attempting, like the editor of Story, to square *Brook v. Brook* with this rule, he admits it, along with *Sottomayor v. De Barros*, to be a departure from it, and condemns them as unsound. The only exceptions allowed by him are marriages contrary to the law of nature—those of polygamy and incest. But this exception is to be strictly construed. "A marriage which by opinion in some countries violates natural law, and by opinion in other countries does not, is not within this rule." In the light of this doctrine *Brook v. Brook* is wrong, and so are the Southern decisions on the white and coloured marriages.

By thus limiting his field of comparison Mr. Bishop has preserved perfect consistency in his doctrine, but it is at the expense of his reputation for extent and accuracy of learning, which makes this perhaps the weakest chapter in his otherwise able and exhaustive work. After discussing the Kentucky case of the nephew who espoused his widowed aunt, he—virtually condensing the language of the Court—makes this curious observation: "A contrary decision, rendering it void in Kentucky while valid in all the rest of the world, would have taken Kentucky marriages out of the law of nations, and made them a mere domestic institution peculiar to the one state." This is assuming the universality of his own rule with a vengeance. The Courts of Kentucky, in giving a contrary decision from what they did, would have had on their side those of every country—including the chief countries of, if not all, conti-

mental Europe—whose criterion of matrimonial capacity is the *lex domicilii*, not the *lex loci celebrationis*. Besides, the author's reasoning here humbly appears to me to be fallacious, for he is arguing in a circle. He gathers his doctrine from decisions and bases his rule on them, and then to justify a particular decision appeals to the universal prevalence of his rule: this is to draw a general conclusion from particular premisses, and then to defend one of the premisses by deducing it from the general principle affirmed in the conclusion. In another passage he indulges in a sweeping inaccuracy of language, which can only be attributed to the want of information on the provisions and working of the Continental legal systems. "In other words," he says, in a section headed, "Why *lex loci contractus* should govern," "must every Government, before allowing a marriage to take place within its territorial limits, cause inquiry to be made whether the parties are *bond fide* domiciled citizens, and if in a particular instance they are found not to be, forbid the banns, or postpone them till a commission has been sent abroad to take testimony, and it is thereby ascertained that the law of their domicile permits them to marry, and to marry in a particular way proposed? . . . There is believed to be no country whose laws provide for this sort of inquiry in advance of marriage." I apprehend that the direct contrary of this statement would express the state of matters in more than one of the states of Europe. That the laws of Prussia at all events *do* make provision for such inquiry, and *will* forbid the banns till their curiosity is satisfied on the domiciliary capacity of a foreigner proposing to marry within their jurisdiction, and that they have done so in a recent instance, is within the certain knowledge of the writer.¹

It is Wharton himself who calls attention to the fact that Story—and the same is true of Burge and Kent—wrote before the advent of the eminent Continental jurists, who have recently done so much to place the principles of international jurisprudence on a firm scientific basis. Of Wharton himself it may in turn be observed, that he has come to his work after an apparently anxious

¹ A Scotsman desiring to marry an Englishwoman in Prussia, at a place where neither an ambassador nor a consul was available—and thus of necessity by a *German*, not a *British* marriage—was required by the German civic authorities to produce a certificate of birth, and either a copy of a newspaper circulating in his domicile in which appeared a notice containing the names of the parties and a statement of their intention of marriage, or alternatively a declaration signed by the "Stadtbehoerde"—the particular official or officials pointed at by which expression he was left to interpret for himself—of his domicile, to the effect that no impediment was known to exist to his marriage. Both the certificate of birth and the newspaper or magistrate's declaration—the latter having been in this instance resorted to—had then to be *visé* by a German consul; and similar procedure had to be gone through on the part of the woman. With this the German authorities were satisfied, and the marriage was duly contracted according to German civil forms before the Buergermeister and witnesses. The means of inquiry adopted may not have been the most adequate possible for the end, but the fact that any such were used shows Mr. Bishop's belief to rest on insufficient knowledge.

and thorough study of their views, and thus, with a vision extended over the jurisprudence of all civilized states—not like that of Bishop, limited to British and American law,—his views are important and original enough to merit a careful consideration. The second edition of his “Treatise on the Conflict of Laws” was published last year. That part of his views which is most original is that on personal capacity and status, where, evidently percipient of the weak points of both the opposed theories, taken along with the practical impossibility of securing the universal acceptance of either, he has endeavoured to erect an independent theory of his own. He starts in this part of his subject with a series of objections which to his mind render the two prevailing theories unworthy of acceptance. To both of them he makes the extreme objection that they would logically involve the recognition of the polygamous marriages of Eastern nations. To the criterion of the *locus contractus* he objects the practical difficulties which arise from a disagreement among states as to what shall be deemed an incestuous marriage. An American Court would on this rule hold valid the marriage made in America of a domiciled Englishman with his deceased wife’s sister. Yet, though the rule logically involves its converse, that a marriage bad at the place of celebration is bad everywhere, it would never be brought to hold invalid the same marriage had in England between American citizens. The same would apply to the test of marriageable age, where two laws conflict as to the period. Surely this is an objection to the illogical procedure of American tribunals, not to the legal principle. If the American Courts lay down the rule for general acceptance, they oblige themselves to adhere to it. To hold the marriage of first cousins void is as repugnant to English jurisprudence as to do so to that of a man with his wife’s sister is to American. Yet an English Court has loyally done so in the case of *Sottomayor*, in conformity, it is true, with the other theory, but whose application made the same demand on it as Mr. Wharton’s instance would have done, namely, the recognition of a foreign status.

A third objection is, that it would expose persons who marry when travelling abroad to the risk, by the omission to observe some petty provision of the local law, of subsequently finding their marriage invalid and their offspring illegitimate. One is inclined to wonder whether this objection is stated in seriousness. People—even American tourists—proposing to enter into the most important relation of life, may surely be expected to put themselves into competent hands—not practically a very great difficulty—for information as to the provisions of the local law, and if they cannot do so, from ignorance of the language or otherwise, to restrain their ardour till they get home again. Still another objection is, that it would open a way for intending husbands to acquire any kind of marital capacity they fancied during the marriage by marrying where such capacity is sanctioned. The answer to this depends

partly on the question by what law the marital capacity falls to be regulated; if by that of the domicile, which is the generally accepted rule, then the objection ceases to be applicable.

His first objection to the theory of the *lex domicilii* is limited to the view of its adoption in the United States. It is the practical one arising from the large number of immigrants continually arriving in the States from many nationalities, who would under this rule find a difficulty "almost insuperable" in the way of their marriages. "Few aliens," he says, "who marry in this country, could be sure that they were legally married; few descendants of such aliens could be sure of their legitimacy." The second objection is that it would involve the recognition of such quasi-penal impediments as the celibacy of priests and the incapacity affixed to Jews in Austria of intermarrying with Christians.

He then states his own theory thus: "A third theory, which has been already partially exhibited, is that matrimonial capacity is a matter of distinctive national policy, as to which judges are obliged to enforce the views of the state of which they are the officers." Elsewhere, bringing it to the test of a specific instance, that of the marriage of white and black, forbidden by the domestic law, had outside the domicile, when judged by the law of the domicile, he says, "The first point for the Court of such a state to determine on such an issue is, whether the prohibition of such marriages is part of the distinctive policy of the state." Should it find it to be so, it must hold that the parties cannot so evade a law which forms part of that national policy. In support of this he quotes the Southern cases of such marriage already discussed. This principle is an exemplification in the concrete of the wider one as to capacity in the abstract, in regard to which the only question for the judge is "what statutes regulating capacity are to be regarded as the products of national policy."

One is not surprised to find an eminent foreign critic citing Mr. Wharton's position as *fort remarquable*; for is it really a fresh theory at all? Is it more than an attempt to justify the diversity of national systems, and the consequent "conflict of laws," by an assertion of the first principle of the *jus inter gentes*, that of the independent sovereignty of each state within its own borders? Can any law of an independent state be said to be anything but in accordance with its "distinctive national policy"? Does not either of the opposing principles, founded respectively on the *lex domicilii* and the *lex loci contractus*, provided that one only be consistently adhered to by the tribunals of all nations, cover the whole field of possibly emergent questions as to capacity in general and matrimonial capacity in particular? Is not either capable, if consistently administered, of excluding conflict from the adjudication of every case involving the recognition of a foreign status? If so, then there is no room for a third theory; but I must postpone for the present any attempt to answer these questions. But

it appears to me that Mr. Wharton's principle is equally open to some of the objections which he brings against the others. When we meet with a polygamous marriage, the first point for the Court to determine is, whether polygamy is part of the distinctive policy of the state between whose domiciled subjects it is celebrated, and if so, to hold it valid. If a man goes abroad to marry in order to acquire a particular marital capacity accorded by the laws of a particular state, we have only to inquire whether it is part of the national policy of that state that such capacity should attach to marriages contracted there, and if so, to accord it here.

The most serious objection to any theory of capacity is, that it would produce a conflict and a diversity of result in different countries. On our author's own example this would be the consequence of his rule, for the Englishman who marries his deceased wife's sister in the States contracts a valid marriage with all its consequences, while in England the children of such a marriage would be bastards; for surely no clearer declaration of national policy on this matter could be conceived than that of the House of Lords in *Brook's* case. That the application of his theory would remove obstacles from the path of the speedy marriages of American immigrants, whose capacity might be diversely fixed by their domestic laws, is true; but that is only to say that here only one law would be applied, ignoring the application of any foreign law. No conflict could arise within the sphere of one national law. But what would be the result should any such immigrant, who had so married in defiance of his domestic law, afterwards return home with his wife? The Courts of his domicile would enable him to throw her off if so inclined. The part of the scientific jurist is to find a common principle on which the laws of different sovereign communities may be based, and which will, when evenly administered by all and each, obviate the possibility of conflict. To propound as a theory a maxim which leaves an actual diversity of rule and a possible conflict of decision is not to attain this end. As one nation is found to adopt the *lex domicilii*, and another the *lex loci contractus*, so, in another sphere, one state favours protection and another free-trade. It is no solution of the question, which is in principle the right course, for the political economist to appeal to the right of each country, being sovereign within its own borders, to take which it pleases. The weakness of Mr. Wharton's theory is, that take it in what aspect one will, when judged as he judges the other theories, by results, it leaves conflicts and anomalies, with whose production he arraigns them, precisely where they were.

In an article on "Recent Cases as to Jurisdiction in Questions of Marriage and Divorce," in the March number of this *Journal*, there is discussed a case from Illinois, with which I am acquainted only from that source. The decision is not strictly in point on the present question, since the Court appears to have blundered in confusing the effects of a suit for nullity with those of one for

divorce, as pointed out by the writer of the article, with whose remarks, except in one incidental particular, I entirely agree. But the case is a trenchant example of the conflict of laws, and of the results of the operation of Mr. Wharton's theory in the case of an immigrant to the States seeking to annul a marriage legally contracted there after returning to his own country.

(To be continued.)

LIEN FOR DEAD FREIGHT.

It is a question of interest for the maritime lawyer, and more especially is it a matter interesting to owners and charterers of ships, whether a lien may be given for what is usually denominated dead freight. It is unnecessary to say that there is no such lien at common law, and a captain is not entitled to refuse to deliver his cargo to the consignee until his claim for dead freight is satisfied, unless he has been given such right of lien by the charter-party or bill of lading. Although, therefore, the owner has a lien for the freight of the cargo on board, he has no such right of lien at common law for cargo not on board, or for dead freight, but his claim against the charterer or other person is limited to a personal right of action.

The further question, however, presents itself, whether in the event of a special clause in the charter-party or bill of lading giving a lien for dead freight, the captain is entitled to retain the cargo until payment of such dead freight? The answer to this question which naturally presents itself is, Surely! when the contract between the parties says so. The answer, however, does not appear so easy as may be at first supposed, and the English Courts, at least in several cases, have refused to allow such lien even when it is given in the charter-party by so many words. And it is interesting to inquire the reasons which have induced the English judges to refuse to give effect to the agreement of parties. In the first place, they say that the term "dead freight" does not in reality mean what is popularly understood by that term, but that it means something else. What that something else is, is not very clearly stated, further than that it is something, as has been said by one of the English judges, which cannot be called, according to the ordinary interpretation, dead freight at all. The reason which has chiefly influenced the opinions of the English judges in this direction is one, doubtless, which is worthy of respect. They say that to give such a lien, except where the sum for which it is claimed is a liquid sum, would be prejudicial to the interests of commerce, and hence they have striven to narrow the meaning of the term dead freight, and to hold it applicable only where a specific sum is mentioned as dead freight. But are the English judges right in

stating that dead freight is something else than what is generally understood by the term? In support of their definition of dead freight they claim the great authority of Lord Ellenborough, and they say that it is in conformity with his definition to hold, as they do, that the claim must be liquid before it can be denominated "dead freight."

Let us, therefore, endeavour to ascertain what dead freight is, as the whole question really turns upon this, and if it is found not to be in conformity with the views of the English judges, then, however worthy may be the motives which prompt their refusal to give effect to it, these motives, it is conceived, must yield to the necessity for recognising the contract of parties.

What is, then, the definition of dead freight given by Lord Ellenborough to which the English judges refer? It is contained in the case of *Phillips v. Rodie*, reported in vol. xv. of East's Reports, p. 555, and in order to understand it we must look shortly at the facts of the case. The rubric of the report is as follows: "Where the freighter of a ship covenanted that if she should not be fully laden, he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight: *Held*, that the shipowner had no lien upon the goods actually on board for the amount of the dead freight, in other words, for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full loading on board: which damages were unliquidated: and there being no lien in such a case either by the usage of trade or the express contract of the parties." The rubric summarizes correctly the facts of the case, and one of the points for decision was whether there was a lien for dead freight in the absence of a special agreement for it. The answer being, that there was no such lien by usage of trade, and therefore that there was none such in that case, seeing it had not been bargained for. Lord Ellenborough, after stating that a lien for freight is a right to detain the goods on board until their freight is paid, goes on to say, "But here the claim to retain is for the amount of damages unascertained, which the parties are entitled to recover for the non-completion of the cargo, commonly called *dead freight*: but it is that term, *freight*, which has misled the defendants; for it is not *freight*, but an unliquidated compensation for the loss of freight recoverable in the absence and place of freight." Nothing appears to be clearer than Lord Ellenborough's words. He is giving his definition of dead freight and showing that it is, properly speaking, not *freight* at all, and that therefore there can be no lien for it apart from special contract, because there is nothing on which a lien could attach.

Let us turn now to the construction which the judges in *Gray v. Carr* put upon Lord Ellenborough's words. In the case of *Gray v. Carr*, which is reported 6 L. R. Q. B. 522, was an action by the owners of a ship in which, *inter alia*, they claimed a lien for dead freight. The charter-party bore that the ship was to load a full

cargo of staves, and that the owners were to have an absolute lien on the cargo for all freight, dead freight, and demurrage. The bills of lading in the possession of the consignee bore that the cargo was to be delivered "as per the aforesaid charter-party to order, he or they paying freight and all other conditions as per charter-party." The majority of the judges held that there was no lien for dead freight, and in the course of his opinion Justice Brett says, "Such a claim for unliquidated damages is not dead freight. I always thought that that great judge," Lord Ellenborough, "was pointing out in *Phillips v. Rodie*, that although many people called unascertained damages for not loading a full cargo, dead freight, they were wrong." And Kelly, C.B., in the same case says, "Dead freight, as well observed by Lord Ellenborough in the case of *Phillips v. Rodie*, cannot be properly used as designating the unliquidated damages recoverable by reason of breach of a contract to ship a full and complete cargo."

It is difficult to see how these learned judges could put such a construction upon Lord Ellenborough's words, and in the face of their confident opinion diffidence might have prevented the assertion that Lord Ellenborough has been misconstrued by them. But there are opinions of no less eminence upon the other side, in favour of the view that Lord Ellenborough here is indeed defining dead freight. In the case of *McLean v. Fleming* (April 3, 1871, L. R. 2 H. L. (Scottish) 128) we have the Lord Chancellor (Hatherley) saying, "Now, dead freight has been defined by Lord Ellenborough as being unliquidated compensation for loss of freight by way of remuneration in respect of that loss," and Lord Chelmsford speaks to the same effect. We may then take it as a settled point that Lord Ellenborough in the passage referred to was defining what dead freight was, and not what it was erroneously supposed to be; and that it is in law unliquidated compensation for loss of freight by way of remuneration in respect of that loss. Mr. Bell's definition is also in conformity with this. He defines it in his "Commentaries," seventh edition, vol. i. p. 620, as "an unascertained claim of damages or unliquidated compensation for the loss of freight, recoverable in the absence and place of freight."

If these are correct definitions of dead freight, the question arises, If in a charter-party a lien is given for it in so many words, why should the contract of the parties not be given effect to? The views of the judges in *Gray v. Carr's* case as to what dead freight is being wrong, there only remains the objection, that to give such a lien in cases where the claim is not liquid would be prejudicial to the interests of commerce. But to refuse to give a lien except where the claim is liquid would be to refuse to give a lien in many cases for dead freight according to the correct definition, and consequently to refuse to give effect to the contract of the parties. Delaying consideration of the objection to do so on the ground of inconvenience and prejudice to the interests of commerce, let us see

whether there are any occasions in which dead freight in the ordinary acceptation of the term is a claim which can ever be otherwise than illiquid to some extent. Even in the case of a uniform cargo, Lord Westbury, in the case of *M'Lean v. Fleming* already referred to, points out that it would be very unreasonable to say that the deficient quantity in the case of short loading should be paid for at the rate assigned per ton in the charter-party. "For," he says, "undoubtedly if the full freight had been furnished to the captain, the expenses of loading and the other expenses attendant upon the additional 210 tons (the amount of deficient cargo in that case) which were wanting would have occasioned some expenditure to the shipowner. I cannot therefore agree that the stipulation for payment of dead freight, without more, entitles the shipowner to have the deficient quantity assessed at the price per ton stipulated to be paid for the cargo that is put on board. The result therefore is, that in a charter-party giving no specific sum as to the amount to be recovered by way of compensation for dead freight, the shipowner becomes entitled only to a reasonable sum, which is another word for unliquidated damages." But if the claim be illiquid while there is a homogeneous cargo at a uniform rate of freight, much more is the claim illiquid where the captain has taken in goods at a different rate to fill up the vacant space in his ship. To get quit of such objections the amount of dead freight would require to be fixed by the charter-party; but it is difficult to see how in a charter-party a sum could be fixed beforehand for dead freight, the amount of which depends upon the deficiency of the cargo, which of course cannot be ascertained till the event. Indeed, as Cleasby, B., says in *Gray v. Carr*, "the rule contended for" by those who maintain that a lien for dead freight can only exist when the amount is definitely ascertained "would come to this, that the only case in which there is a lien for dead freight is where the claim is not for dead freight at all. If there is an agreement to pay so much a ton upon the carrying capacity of the ship, it matters not whether the ship is full or empty, the same sum is to be paid by the agreement, and there is nothing like dead freight in the transaction; yet it is said that the clause for dead freight was intended to apply, and can only apply, to such a charter-party."

If, then, the objection on the ground of the claim being illiquid is good, it would hold in all cases except in the case of a rate of freight at so much per ton of the ship's capacity, which would give no room for the existence of dead freight at all, reducing the provision in the charter-party to a meaningless phrase quite inapplicable to the circumstances.

What, then, is the reason given for refusing to give a lien for dead freight unless the claim is liquid?

It is said, if it were recognised in law that there was a lien for dead freight in all cases, a cargo might be retained by the master of a ship, and he might refuse to deliver it until payment of a claim which could not be ascertained until after the lapse of a consider-

able period of time, and that this would be inconvenient to the parties and prejudicial to the interests of commerce. In so far as the objection of inconvenience is concerned, the merchants themselves surely are the best judges of that. And, as Lord Westbury says in *M'Lean v. Fleming*, already quoted, "they ought to have considered that when they entered into the contract;" and he goes on, "There having been a clear stipulation that the lien shall enure for dead freight, which will make it enure for the sum to be assigned as the proper compensation for the dead freight, I think it is impossible to set up any consideration of inconvenience in answer to the clear terms of the contract which has been entered into." However the objection of inconvenience may fare, this last objection referred to by Lord Westbury is the most serious objection, viz. that the refusal of such lien where stipulated for is contrary to all principle, and in the teeth of the rule that the contracts of the parties must be given effect to where they are clearly expressed.

But it may be objected, previous decisions require that no lien should be recognised for an illiquid claim in name of dead freight, and it was because of these previous decisions that the judges in *Gray v. Carr* decided as they did. No doubt the judges do refer to previous decisions as pointing to the result they reach, although their opinions do not by any means rest exclusively or even mainly upon these decisions. They refer, for instance, to the case of *Phillips v. Rodie*. But this case has been already touched upon, and it has been shown to give no countenance to the doctrine that an express lien for dead freight does not apply where the dead freight is an illiquid sum. The case of *Kirchner v. Venus* (12 Moore's P. C. Cases, 361) is also referred to, but that case simply decided that a payment provided in the charter-party to be made within one month after sailing—vessel lost or not lost—was not freight in the proper sense at all, but a sum "to be paid for taking the goods on board and undertaking to carry them." *Pearson v. Goschen* (17 C. B. N. S. 352, 33 L. J. C. P. 265) is another case referred to by the judges in *Gray v. Carr*, and it certainly does appear to be an authority in favour of the view that unliquidated compensation for loss of freight is not dead freight, but something else. The case of *Gray v. Carr*, therefore, following upon *Pearson v. Goschen*, bade fair to overturn Lord Ellenborough's definition, and to lay it down as law that dead freight must be a liquid sum in order to entitle the owners to the lien specified for it in the charter-party.

It is satisfactory, therefore, to find the House of Lords giving effect to the clearly-expressed contract of the parties, and brushing aside the fallacies which were in danger of interfering with the fearless application of those broad principles of construction applicable to all contracts. The case of *M'Lean v. Fleming* originated in the Scottish Courts. Mr. Fleming was the owner of the bark "Persian," and M'Lean & Hope entered into a charter-party at Constantinople whereby it was agreed that the ship should load a full cargo of cattle-bones from certain ports named. The ship was stated in

the charter-party to be of the measurement of 598 tons or thereabouts; and the freight was to be at the rate of 35s. per ton of bones—the captain or owner to have an absolute lien on the cargo for all freight, dead freight, and demurrage. Upon the ship arriving at her destination it was found that there was a deficiency of 210 tons, which the ship could have carried beyond what was actually on board, and for this amount the captain claimed a lien. The Second Division of the Court of Session found that the captain was entitled to a lien, and the House of Lords upon appeal confirmed that decision. In the course of his opinion the Lord Chancellor said, "There is no difficulty in ascertaining what the engagement was in this particular case. The cargo was of a uniform description. It does not appear to me that there is any difficulty, or anything to induce us to suppose that there was any misunderstanding between the parties as to what the real contract was. So much per ton has been agreed to be paid for a full cargo of a uniform description of goods. A full supply of a uniform description of goods has been agreed to be supplied, and there is no difficulty in ascertaining either the quantity of the cargo agreed for, or the amount agreed to be paid per ton for the cargo. The payment is to be at the same rate in respect of the goods not supplied as for the goods supplied. Of course there may always be some difficulty in liquidating the damages, because it may be that the captain may have had it in his power to fill up the cargo; he may have had an offer from other parties to fill up the deficiency; he may have had an offer from the very parties who entered into the agreement to secure him in respect of dead freight. All that will have to be considered if the case occurs." Lord Chelmsford also says, "It may be observed that even where there is an express stipulation to pay full freight as if the goods had actually been loaded aboard, and that the master shall have the same lien upon the goods actually on board as if the ship had been fully laden, the case may be one of unliquidated damages; for the master may have filled the vacant space with the goods of other persons, and the freighter would be entitled to have an allowance for the profit thus made. In construing the charter-party it must be assumed that the parties understood the meaning of the terms they employed, and that amongst others the term 'dead freight' meant (according to Lord Ellenborough's definition) 'an unliquidated compensation for the loss of freight.' The freighter with this understanding agrees to load on board the respondent's ship a full and complete cargo of cattle-bones, and to pay freight at the rate of 35s. sterling English per ton. He knows that if he failed to perform his covenant to load a full and complete cargo, he will be liable to the shipowner in damages under the name of dead freight, and he agrees to give the captain or shipowner an absolute lien on the cargo for all freight, dead freight, and demurrage. Why should not his agreement have its intended effect? This case can hardly be considered to be one of unliquidated damages, because the captain

not having brought home any other goods than those of the appellants, the proper measure of the shipowner's claim appears to be the amount of the agreed freight which he would have earned upon the deficient quantity of 210 tons of bones. But whether the amount of his damages is to be regarded as ascertained or not, I am of opinion that the charter-party gives him a lien for his claim on account of the deficient cargo." And Lord Colonsay says, "The circumstance that the precise amount is not specified does not affect the principle. In almost any case that might happen there might be some inquiry raised as to the amount of dead freight. It may be alleged on the part of the charterers that other goods were received, or it may be alleged that certain things have to be deducted, and so forth; but still the contract is there. It may be inconvenient or not that it should receive effect, but still there it is, and it is binding on the parties."

In this case of *M'Lean v. Fleming* the House of Lords have authoritatively decided that where a lien for dead freight is bargained for, such lien will be given effect to where the claim is not complicated by the captain having taken on board cargo to fill up the unoccupied space in the ship. But from the observations of some of the judges, if the claim be so complicated, it is seen that they leave it an open question whether or not the lien would be given effect to. Bearing in view, however, what has been said by Lord Westbury as to the difficulty in all cases in ascertaining the amount, the consideration arises whether the difficulties are so much greater in any other case likely to occur as to render it advisable to refuse to give effect to the distinct bargain of the parties.

Passing over the case where a uniform cargo is contemplated at so much a ton, and where the amount of dead freight will simply be the difference between the cargo actually on board and the ship's capacity—the case of *M'Lean v. Fleming*—making certain deductions, as Lord Westbury points out, for the expense of loading and other expenses, let us take the case where the master, instead of bringing his ship home partially empty, fills up with other cargo at a lower rate of freight. In this case, as in the previous one, the principle of calculation is quite simple, and the detailed working out need not be formidable. Having found the difference between the cargo put on board at charter-party freights and the capacity of the ship, there will fall to be deducted from the sum of short freight thus brought out the amount of freight of the cargo taken to fill up, the difference of course being the amount of loss or dead freight.

In the case of *Gray v. Carr* the bargain was to load "a full and complete cargo of staves ^{and} or grain, seed or stowage goods, or lawful merchandise, . . . paying freight as follows, viz.: 8s. per 100 pieces of oak staves, 34/36 in. × 4½, 16 in. × 11/14 lines, all French measure: other dimensions in proportion, and other merchandise if shipped to pay in full and fair proportion." Oak staves were shipped, but short of a full cargo. On arrival at the port of dis-

charge the owners claimed £364, 19s. 5d. as dead freight for the cargo short-shipped. The ship's capacity being known, the ascertainment of the amount of dead freight could not have been a matter of much difficulty. If it was not strictly a liquid claim it might fairly be considered a claim *quod statim liquidari potest*, and hence the remainder of the maxim might be held applicable, *pro jam liquido habetur*. Cleasby, B., says with reference to this, "In the charter as it stands altered in writing the calculation would be simple. It obliges the charterer to load a full cargo, and makes the freight payable at so much per 100 pieces of oak staves and other cargo in fair proportion. It does not make the freight payable in respect of different cargo, according to different specified rates, so as to make the freight to be earned vary with the cargo carried. But whatever be the cargo carried, it would be paid at the same rate as if all had been oak staves. So that although the claim in form would be as damages for not loading a complete cargo, yet as soon as the capacity of the vessel for carrying oak staves is ascertained, the claim is liquidated by deducting the freight actually carried."

There is a further position, however, in which matters might be found at the port of loading which presents greater difficulty to the working out of a lien for dead freight than the cases previously mentioned. That is, where the charter-party contemplates different commodities at different rates of freight. How in such case will the agreement of parties for a lien be worked out? Such a contract, in the circumstances supposed, certainly does present difficulties in the adjustment of the damages sustained. But it is thought a system of average could in such cases be struck which would be recognised by all parties and given effect to. The amount of vacant space in the ship being ascertained, let that be multiplied by the mean rate of the freight bargained for in the charter-party. That is to say, suppose freight is bargained for as follows, viz.: at 11s. for every cwt. of sugar; 12s. 6d. per cwt. for every bag of coffee; 13s. 6d. per cwt. for every cask of coffee. Upon finding the unoccupied space, multiply this by 12s. 4d., the mean freight of the three different commodities specified, and you have the amount of dead freight. But whatever difficulties might be experienced in adjusting the amount of the claim, as the learned judges in the case of *M'Lean v. Fleming* said, this is the affair of the contracting parties, and it certainly does not appear to afford a sufficient reason for refusing to give effect to their specific contract.

THE LAW OF HOMICIDE IN SCOTLAND.

I.

SENTENCE of death has not been passed upon any criminal in Scotland for some years, except in one recent case in Glasgow, and

indeed the capital sentence has been but twice carried into execution north of the Tweed since Chantrelle was hanged for the murder of his wife. One case was that of an old man at St. Andrews, who in the excitement of a drinking-bout killed his wife and then endeavoured to make away with himself; the other was that of a lad in Glasgow, only eighteen years of age, who struck a mortal blow at a companion in the height of a drunken quarrel. Of course we are bound to assume that the grounds upon which the authorities decided to allow the law to take its course in these two latter cases were well considered and sufficient, but at the same time there cannot be any doubt that since the date of these last executions men have escaped capital punishment, and even a capital sentence, who have been convicted of crimes quite as atrocious as those for which the St. Andrews and the Glasgow murderer underwent the extreme penalty of the law. Criminals now escape a capital conviction for crimes which twenty, or perhaps even ten, years ago would have entailed the punishment of death. It cannot, we fear, be pretended that the taking away of human life by criminal violence is less common now than was the case twenty years ago. Murder trials, indeed, are by no means infrequent. A Glasgow Circuit seldom passes without one or two cases of the kind, and at the recent Spring Circuits there were murder trials at Perth, at Aberdeen, and at Dumfries. A complete acquittal from such a charge is by no means common. With the exception of a recent case at Aberdeen, where the prisoner was found to be insane, there is, to the best of our recollection, no recent instance of the complete acquittal of a prisoner charged with murder. The verdict which in most of the recent cases has approved itself to the jury has been one of *culpable homicide*, but sometimes indeed they have been content to return a verdict simply of *assault*. Now, how comes it that a man who twenty years ago would have been pronounced by the unanimous voice of fifteen of his fellow-countrymen to be guilty of murder, is now by the same tribunal found *not guilty* of murder, and guilty only of a much less serious offence? The nature of the criminal act has not changed. It cannot be pretended that the act of a man who to-day in the excitement of a drunken quarrel stabs another to death, differs either in the extent or in the quality of its guilt from that of him who stabbed another in similar circumstances in the year 1862. Yet the latter was convicted and hanged for wilful murder; the former is guilty of no more than *culpable homicide*, and may very possibly have the further benefit of a recommendation to mercy on account of the weak character of his intellect. The maxims of the law have undergone no change during the last half century. The legal definition of murder is the same as when Baron Hume wrote his treatise. No statute has passed through Parliament defining the character of the crime, or limiting the class of cases which fall under the category of murder. There is no authoritative judgment of the Court impugning the leading decisions

which have guided the practice of the past. Lord Deas directs a jury in 1882 precisely as he would have directed it in 1862. A charge of Lord Justice-Clerk Boyle would not appear antiquated from the lips of Lord Justice-Clerk Moncreiff.

But if the cause of the change in the general result of murder trials be not found either in the changed conduct of offenders or in the changed teaching of the law, it must be found in the changed sentiments of juries, or rather of the great public from which juries are chosen. It would seem, in fact, that within the last twenty years Scottish people have come to be of opinion that men ought not to be hanged except for deliberately planned and premeditated murders; and having arrived at that conclusion, they have taken action through their representatives in the Court of Justice—the jury—to effect the desired result. The nature of the change to which we have adverted cannot perhaps be better illustrated than by referring to one or two recent instances of trials for murder.

The first case which we shall cite is that of Rintoul and another, who were tried for the murder of a policeman in Edinburgh in the spring of last year. Two lads of questionable character were found by a policeman late one night in a passage in Elm Row, Leith Walk, where they had no right to be. From the evidence led at the trial it seemed extremely probable, though it was not conclusively proved, that the lads had entered the passage with felonious intent. The policeman finding the lads in these suspicious circumstances, very properly challenged them, and attempted to detain them, when the two ruffians at once set upon him, and one of them stabbed him instantly to death. There was no provocation, for the law can never regard the discharge of his duty by one of her officers as a provocation justifying or palliating a crime. Equally idle, according to the received maxims of our law, should it have been to pretend that there was no intention to kill, for the law teaches that such an intention must be presumed where violence of a character calculated to destroy life has been used. No loophole of escape, indeed, appeared open; yet the verdict was one only of *culpable homicide* in the case of the lad who used the knife, and of *assault* in that of his companion.

The next case which we shall cite is even a more remarkable example of the leniency of modern juries. It is that of Davidson and M'Cormick, who were tried at Dumfries in April last for the murder of a gamekeeper. The facts of this singular case were as follows. Two gamekeepers on an estate near Castle-Douglas, hearing shots very early one winter morning, aroused the gardener and coachman to come to their assistance, and then proceeded in the direction from which the alarm came. To make sure of capturing the poachers the party divided. Douglas, the head keeper, took with him Rae the coachman, whilst the under keeper was accompanied by the gardener. The former pair had the good, or rather, as it turned out, the evil fortune to fall in with the trespassers

first; for, watching by a dyke-side, they observed two men, well known to both of them as habitual poachers, emerge from a thicket and proceed across a field in front of them. Douglas at once stepped forward and challenged the men with the word "Stand!" "Stand back or I'll shoot you," was the reply from one of the poachers; and immediately one of them, Davidson, suited the action to the word by levelling his gun at Douglas and shooting him dead. Then with a courage worthy of a nobler conflict, Rae the coachman, all unarmed as he was, advanced upon the assassins; but he had hardly taken a step ere he too was shot down, desperately wounded, by the other poacher, M'Cormick. Such were the particulars of this cruel crime as narrated by Rae at the trial, and his evidence was fully corroborated in regard to every incident of which he was not the sole eye-witness. No wonder, therefore, that after reciting these facts the Lord Justice-Clerk told the jury, "Gentlemen of the jury, if these be facts, and I see no reason to doubt the truth of the evidence you have heard, I cannot tell you that this is not murder." But the jury, in the exercise of their undoubted right, thought otherwise. Both prisoners were acquitted of the capital charge. Davidson was convicted of *culpable homicide*, M'Cormick of *assault*.

"Ye see we didna like to convict a man o' murder on the evidence o' one witness," a juryman was overheard to remark on leaving the box. As if, forsooth, evidence not sufficiently reliable to send a man to the gallows was quite good enough to send him into twenty years' penal servitude! We are bound to assume that the juryman in question misrepresented the views of his co-jurors, and that the others had more logical grounds for their decision; yet we will venture to hazard two remarks upon the result of this trial, viz. (1) that had the crime of Davidson and M'Cormick been committed in 1841 instead of 1881, both of them would in all probability have been hanged for murder; and (2) that if the verdict here returned was just, our practice is at variance with the theory of our criminal law, for in no authoritative declaration of the law of murder, judicial or institutional, is a definition of that crime to be found which is not covered by the facts disclosed at the trial of Davidson and M'Cormick. It is of some interest to note that in the eyes of one of the most lenient of our judges the Kirkcudbright poachers were guilty of murder. In passing sentence upon some night-poachers at Glasgow in June last, Lord Young took occasion to remark upon the perils of the offence, and referring to the Castle-Douglas case, he remarked, "My only wonder is that these men were not hanged, for undoubtedly they were guilty of murder."

Both the above-cited cases are examples of crimes which are fortunately of very rare occurrence amongst us; but there is another class of homicides of sadly frequent occurrence, in dealing with which the changed attitude of juries is no less clearly marked.

We refer to what for shortness' sake, and, alas! without doing any injustice to that city, we may designate the "Glasgow murder." This crime figures at least four or five times every year before the Circuit Courts, and there seems to be a singular uniformity in its sickening details. A labourer of rather disreputable character comes home late one night, and no sooner finds himself within his own peaceful domestic circle than he sets upon some member of his family, generally his wife or his mother, and without deigning to explain the reason why, proceeds to kick her to death. He was always a drunken brute, and drunkards are seldom good sons or husbands; but there is no evidence that he cherished any peculiar malice against his victim, or in his sober senses resolved to make away with her. Thirty years ago this would have availed him nothing. "Drink," saith the law, "is an aggravation, not an excuse for crime, and if when a sober man kicks a woman to death we decline to inquire as to his intention, still more shall we reject all speculations as to the aim of drunken violence." The law has not changed, but nowadays juries refuse to be guided by its maxims, and so it happens that the perpetrators of "Glasgow murders," instead of being hanged as they were only a generation back, escape with ten, or at worst, it may be, fourteen years' penal servitude.

A consideration of the change in our practice, the character of which we have above indicated, suggests two important questions: (1) Whether the change is in itself a wise one? and (2) whether it has been effected in a prudent and convenient form? To this latter question, at all events, we are disposed to return a negative answer. Whatever opinion may be held as to the degrees and punishment of murder, no one, we venture to think, will combat the proposition that it is most undesirable that a law should continue to exist to which juries refuse to give effect. If the law declare certain facts to amount to murder, the jury which on proof of these facts refuses to convict of murder is undoubtedly guilty of a dereliction of duty. Yet, as we believe, that is what constantly occurs. It is probably partly from a consciousness of this fact and a desire to avoid a collision; partly because, being themselves of the people, they share the popular sentiment that the exponents of the law who have occupied the Bench in recent murder trials have generally refrained from coercing juries with any very explicit declarations as to what is the law of murder. It seems better to avoid any declaration which must either falsify the law or induce the jury to falsify their consciences.

Another unfortunate result of the present state of matters is the uncertainty in which it leaves the issue of trials for murder. As a general rule, Scottish juries nowadays refuse to convict of murder where there has been no premeditation; but occasionally it does happen that a strong-minded and logical jury is found, which insists upon a conviction on the hard and fast lines of the old tradition of the law. This result is extremely inconvenient, the more so that the question as to whether the capital sentence is to be carried out rests

not with the Scottish law officers, but with the English Home Secretary. Less inconvenience would arise from this fact were the general practice of juries in England the same as it now is in Scotland. But this is not the case. Men are constantly convicted of murder by English juries who would in all human probability be found guilty of no more than culpable homicide in Scotland. At least once a month on an average a man is hanged in some English provincial town for a murder of the class we have above described as the "Glasgow murder." Now, when it does happen, as occurs once in a way, that a Scottish jury brings in a verdict of wilful murder in a case of the kind, it is of course difficult for the Home Secretary to understand why the Scottish criminal should not be treated precisely as would one convicted in similar circumstances in England. Thus it may happen (and we believe in recent years has once or twice happened) that a man is hanged for murder whose crime is not one whit more heinous than that of another who, before a less scrupulous jury, has escaped with a few years' penal servitude. The conviction of Fergusson for murder at Glasgow Winter Circuit last Christmas-tide was a surprise to every one—to no one more so, as we venture to think, than to the judge who tried the cause. No one in Scotland, not even the jury who tried the case, for they strongly recommended him to mercy, thought that the criminal should be hanged; yet we have the best authority for stating that the English authorities had fully resolved to hang him, and that it was only at the eleventh hour that he was saved by the urgent intervention of the law officers of the Crown for Scotland.

There are some who profess to admire "the glorious uncertainty of the law" (a phrase for which might well be substituted, "that glorious ignorance of the law which gives rise to litigation"), but no one can view with feelings other than of dissatisfaction any indications of uncertainty in the administration of our criminal law. It has often been urged upon eminent authority that the certainty of punishment is of greater importance than its severity, but without any reference to severity, there can be no doubt that it is of the last importance that punishment should be certain. Unfortunately the punishment of criminals in Scotland, probably not less so in England, is at present in the last degree uncertain. "We do not hang old nuisances like you nowadays," remarked one of the judges at last Glasgow Circuit to an habitual offender, and accordingly—in lieu, as we presume, of hanging her—he gave her thirty days in gaol. Had the same criminal been tried in the other courtroom, not twenty feet away, it is probable, nay, it is morally certain, that her punishment would have been at least one hundred times more severe! It is not, however, the province of this article to discuss the uncertainty of the punishment of crime in general, but only the uncertainty of the punishment meted out to homicides. Here there are three elements of uncertainty—the disposition of the judge, that of the jury, and the subsisting divorce between the theory and the practice of the law of murder. Too frequently the

result of a trial for murder is little better than a lottery. Who shall predict of the man placed in the dock at Glasgow, say, for the murder of his wife, whether he shall forfeit his life or have one day in gaol? We have seen both of these results in such a trial, and every degree of fortune between the two extremes. Within the last three years it has happened that a man whom the Crown authorities, in possession of full precognitions in regard to all the facts of the case, have thought fit to put in the dock on a charge of murder, has escaped with a single day's imprisonment; and it has also happened within the same period that two men against whom, after evidence led, Crown counsel deliberately asked a verdict of murder, have got off with three months in gaol.

Nothing better serves to illustrate the prevailing uncertainty of this branch of criminal administration than the complete inability of counsel, either for the Crown or for the prisoner, to predict the result of murder trials. In the case of the counsel for the prisoner, indeed, there is little remarkable in this; for if, as generally happens, the case is a *poor's* one, in all probability he gets no precognitions. With Crown counsel, however, the case is entirely different. They have full precognitions carefully revised before the trial, and as they are supplied with a list of the witnesses for the defence, if there be any, a surprise is almost impossible. Yet Circuit after Circuit the same story is repeated. With solemn countenance the Advocate-Depute tells the awestruck juniors that there is one very bad case indeed, and significantly adds that he does not see his way out of it at all. This is indeed quite true. He does not see any way out, but in his secret heart he believes very confidently that some way out of it will be found. He knows all the facts of the case, and as a lawyer, he knows that the crime is murder, that no true verdict other than that of murder can possibly be returned. But he has learned by experience that some escape will be found, that if his Lordship be firm, the jury will be stupid and merciful, or that if the jury seem bloodthirsty, his Lordship will concuss the prosecutor into the acceptance of a plea. Now and again, however, it happens that a judge who takes the old-fashioned view of things, meets a jury which is resolute and intelligent, and then in truth the man is lucky indeed if he escape with his neck.

We might pursue the subject further, but enough has perhaps been said to show how eminently unsatisfactory is the present state of matters. Whether or not the change which has taken place be a wise one, it is of a character upon which it is now impossible to go back, and it were well, therefore, that it should be formally and authoritatively sanctioned and defined by the Legislature. In this view the second question which we suggested, as to whether the change has been a prudent one, may appear to be one of merely speculative interest. A brief consideration of it may, however, help us to arrive at a just conclusion as to the exact direction and limits to be observed in any formal change of the law. This subject must be postponed to a subsequent article.

STATUTES AFFECTING SCOTLAND.

THE statutes relating to Scotland which date from this session are not numerous, although, all things considered, Scotland may be congratulated upon having received so much attention. Several important Acts are before us, and the fact that they have been carried safely through the many perils which in these days await the Bill in its infancy says much for the ability and perseverance of those in charge of Scottish legislation.

The first statute which we notice (45 Vict. c. 11) forms an amendment upon the Public Health Act of 1867. It relates to the provisions contained in that Act for the formation of special drainage and water-supply districts. It was found necessary to provide machinery for altering the boundaries of such districts after they had been formed. Accordingly, in 1879, 42 and 43 Vict. c. 15 was passed with the view of supplying the means of doing this. This Act seems to have proved a failure, and hence the necessity for further legislation, repealing that of 1879. Such a mode of proceeding is certainly far from satisfactory. A requisition signed by at least ten of the inhabitants calling for an alteration of the boundaries may be presented to the local authority, who shall be bound to meet and consider the matter after twenty-one days' notice of the meeting has been given to its members. If the local authority resolve to alter their boundaries, the mode of appealing against their resolution is the same as that provided in the case of the formation of a district under the Public Health Act. There is this rather curious limitation of the powers of the judge, "Provided that if the Sheriff or Sheriff-Substitute, as the case may be, shall disapprove of the resolution of the local authority, he may vary the same, *but only with the consent of the local authority.*" He is, in fact, to suggest improvements for their approval. A district may be altered in three ways—(1) by enlarging or limiting its boundaries; (2) combining two or more districts or portions thereof; (3) by enlarging or limiting the boundaries, and at the same time combining districts in whole or in part. There appears to be no provision for appealing against the local authority when they refuse to move in the matter.

The "*Act to regulate the Procedure of School Boards in Scotland in the Dismissal of Teachers*" (45 and 46 Vict. c. 18) is, as is well known, the outcome of a compromise, and will probably be received with but small thanks by the profession concerned. Schoolmasters sought the right of appeal to the Sheriff against capricious dismissal. The Sheriffs may congratulate themselves that they have not been called upon to decide in cases of this sort, involving, as they would have done, delicate and often painful investigations, and calling forth much public feeling. Under the 3rd section of this Act it is provided that in order to render a resolution for the dismissal of a certified teacher valid, it must have been adopted at a meeting called not less than three weeks previously, and by circular addressed

to each member of the board intimating the purpose of the meeting. Notice of the motion for his dismissal must also be sent at least three weeks before the date of meeting to the teacher himself. The circulars and notice must be sent by registered letter. Further, the resolutions for the teacher's dismissal must be agreed to by a majority of the full number of members of the board. This is all that the teachers have gained by their agitation. Not much, perhaps, but they are not likely to obtain more.

The next statute which we observe is one which was jealously watched by members of the legal profession in Scotland. We refer to 45 and 46 Vict. c. 31, "*An Act to render Judgments obtained in certain Inferior Courts in England, Scotland, and Ireland respectively effectual in any other part of the United Kingdom.*" In this Act the word "Court" includes, as applicable to Scotland, all the Civil Courts held by the Sheriff. When a judgment has been obtained for "any debt, damages, or costs," and after the appealing days have expired, the party holding the judgment may apply to the Sheriff-Clerk, and obtain a certificate according to prescribed form, stating the fact of a judgment having been obtained. He can then take this document to the registrar or other officer of the Court in which he seeks to have the judgment enforced, for registration there, in order that process of execution may follow thereon. The registration must take place within a year of the date of judgment. The Court in which the registration has taken place may order it to be cancelled "on proof of the setting aside or satisfaction of the judgment registered." Section 9 deals with a difficulty arising from the fact that there is unlimited jurisdiction in the Sheriff Courts over moveables, whereas it is restricted in the County Courts of England and Ireland. It provides that where an inferior Court judgment obtained in Scotland cannot be registered in corresponding Courts of the sister countries by reason of its being for a greater amount than could have been recovered in an action before them, registration is to be effected in the Court of Common Pleas. The Scottish Lion is protected by section 10. The Act is not to apply to a judgment pronounced by an inferior Court in any of the three kingdoms "unless the whole cause of action shall have arisen, or the obligation to which the judgment relates ought to have been fulfilled, within the district of such inferior Court, and the summons was served upon the defendant personally within the said district." The aggrieved Scotchman threatened with a registered judgment improperly obtained, may seek his remedy by a suspension and interdict in the Court of Session.

One practical result of this Act ought to be the entire abolition of mandatories. It places the Sheriff Court in precisely the same position as that now occupied by the Court of Session.

The "*Act to amend the Law relating to Civil Imprisonment in Scotland*" (45 and 46 Vict. c. 42) is the result of a long and careful inquiry. Public opinion is much divided upon the subject, and the trading community would have probably welcomed a repeal of

the recent legislation in preference to the statute now under consideration. As far as traders are concerned, the mischief was in their opinion done when imprisonment for ordinary debts was abolished. They had no interest in the limited class of debtors still threatened with the *squalor carceris*.

The great bulk of the evidence led before the Committee of the House of Commons was certainly in favour of the total abolition of imprisonment for debt. To a great extent, however, that evidence was given by men not acquainted practically with the execution of diligence. Had law agents and sheriff officers been examined, they might have been able to tell of the wholesome effect which the threat of imprisonment had in producing payment at the last moment. But whatever may be the result of the abolition of imprisonment for debt, there can be no doubt that recent legislation left matters in a very anomalous state. Why the Crown should still imprison, or the mother of illegitimate children, while a man's baker or butcher had no power to do so, was rather hard to see. The present Act has to some extent at least removed the anomaly. Imprisonment for alimentary debts ceases after the 1st day of October 1882. But alimentary debts still continue to be dealt with after a special fashion. The Sheriff has now power to commit to prison "for a period not exceeding six weeks, or until payment of the sum or sums of aliment and expenses of process decerned for, or such instalment or instalments thereof as the Sheriff or Sheriff-Substitute may appoint, or until the creditor is otherwise satisfied," any person wilfully failing to pay within the days of charge an alimentary debt. The clause is, in our humble opinion, rather obscure. Does six weeks form the limit of imprisonment in every case? We presume so, but the composition of the sentence would render it doubtful. May the Sheriff sentence to six weeks' imprisonment as a punishment, whether or not within that period the debt is paid or security given to the creditor? If imprisonment is to be viewed as the punishment for contempt of Court, why should a settlement with the creditor affect the period of its duration? The Act lays upon the debtor the burden of proving that the failure to pay was *not wilful*. He must prove the want of means and inability to find them. He may be imprisoned again at intervals of six months until the debt is paid. The imprisonment is not to operate as an extinction of the debt. As regards imprisonment for rates and assessments, no one can now be imprisoned for a longer period than six weeks in respect of failure to pay the rates or assessments due for any one year.

This Act deals also with lawburrows. This process is to be no longer competent before either of the Supreme Courts. The petition for lawburrows must as a first step be served at once upon the person complained against, that the petitioner and respondent are to appear with their witnesses, and the case will proceed, without pleadings, under the Summary Procedure Act. One credible witness is sufficient, and the parties may present themselves as

witnesses. If the petition is well founded, then the respondent is to be ordered to find caution, or failing caution, may be imprisoned. A sheriff may imprison for six months, a justice of the peace for fourteen days. Persons sent to prison either for alimentary debts or under the process of lawburrows are not to be alimented at the expense of the creditors or applicants who may have been the means of sending them there. The State has taken this burden upon itself.

Why should not the main provisions of this Act apply to all kinds of debt?

NOTES IN THE INNER HOUSE.

IN *Hogarth v. Broomfield* (June 16, 1882, Second Division) a point which, to quote the remarks of the Lord Justice-Clerk, "is often under the consideration of the Court," was raised. A farmer named Smart got a thrashing-mill erected on his farm; there was to be a sum given yearly for its use; the price was to be paid in instalments, and until this was fully paid the mill was to remain the property of the builder. The farmer, after a small portion of the price had been paid, got into difficulties and granted a trust-deed. The question came to be, Could the trustee claim the mill in a competition with the builder? This question the Court have answered in the negative. The Sheriff-Substitute (Dickson of Berwickshire) held that this was a case of sale followed by delivery, the only question being whether the condition of reserving right of property was legal and effectual, notwithstanding delivery. He held that this condition was intended as an additional security, but that the pursuer was not entitled in such a manner to retain a security over the mill which he had sold and delivered. The Sheriff concurred in holding that it was a case of sale; "but then, according to the evidence of both pursuer and Smart, it was a conditional contract. . . . This was a perfectly lawful and reasonable condition, and was undoubtedly binding and effectual." The Court of Session took the same view. Referring to the plea of reputed ownership, the Lord Justice-Clerk remarked, "When a person possesses upon a subordinate, but definite title short of that of property, there is no room for the doctrine of reputed ownership. It is quite clear that if the possessor has a subordinate and legal title to the possession, and not a full title of property, it is impossible to apply the doctrine." Lord Young said, "I am not very careful to inquire whether there was a contract of sale here or not. I think, if the facts are correctly represented, that there has been no contract of sale, which is a contract for the transfer of property, for the contract here was that property should not pass. . . . If I make a contract which is not to pass the property of the thing transferred, then I decline to call it sale. The rights of parties cannot depend merely

on the words used." The following remarks of Lord Rutherford Clark may also be noted: "Property cannot pass by mere possession contrary to the wish of both giver and receiver. And as Smart never became the owner, he could not transfer the property to his trustee. A trustee for creditors has really no higher right than his author. I do not seek to consider whether any other or further remedies might not be open to creditors who had used diligence, or to a trustee in a sequestration. They are both in a different position from a merely voluntary trustee."

The above case may be compared with the decision in *Cropper* (7 R. 1108). Lord Young formed the minority in that case, and the Lord Justice-Clerk was absent, the majority being Lords Ormisdale and Gifford. It is, we think, difficult to reconcile the two cases. The authority of *Cropper* might well mislead a Sheriff-Substitute, nor is the distinction drawn between it and the case of *Hogarth* by Sheriff Pattison a very clear one. There is, however, this difference. In *Cropper's* case a creditor was doing diligence, and it may be said that his right is a stronger one than that of a trustee who is simply in the place of his author, but we cannot conclude this from the judgments pronounced in *Hogarth*. If ever the terms of a document could make the contract to which it referred one of hiring, that was the effect of the writing produced in *Cropper*. We must conclude that the decision then given is no longer an unshaken authority.

The case of *Macdonald v. Butler Johnstone* (July 1, 1882, First Division) raises two points of interest to proprietors. It was an action by a tenant against the landlord concluding for damages caused by flooding. The period embraced in the action commenced several years prior to the defender's succession to the estate, who held it under a deed of entail. The Lord Ordinary (M'Laren) decided (and upon this point his judgment was acquiesced in) that the defender did not represent the previous possessor in such a way as to render him liable for damages incurred prior to his (the defender's) succession. Upon the main question the Lord Ordinary held the pursuer's claim excluded, in respect that he had continued to pay rent without making any demand for damages, although a correspondence had been carried on relating to the subject between him and the defender's agents. "I am not of opinion," his Lordship says, "that the correspondence is sufficient to save the claim from the operation of the rule laid down in *Hunter v. Broadwood* (17 D. 340). That rule is founded on the consideration that a creditor, or one who considers himself to be a creditor, in a sum of money will not in general make payments to his debtor without endeavouring to obtain payment of his claim by set-off, or at least reserving his right to recover it in competent form. If he pays without such reservation, the party receiving payment may reasonably presume that the counter-claim is not insisted on. This presumption, which is strong even in the case of a single payment by an alleged

creditor to his debtor, becomes absolute when a series of payments are made regularly and periodically without deduction and reservation." But the Inner House have allowed a proof before answer.

In *Murray v. Lee* (July 3, 1882, Second Division) the Court held that a breach of a cautionary obligation had taken place under the following circumstances. The defender had signed a letter to the effect that he would see a certain debt due to his client, the pursuer, paid at the rate of £10 a month. Upon failure to pay the first instalment the pursuer proceeded to point his debtor's effects without intimating the fact of non-payment to the defender, and then brought an action against him for the full amount. Lord Craighill, who gave the judgment of the Court, said, "My reading of this letter brings out an obligation on the part of the pursuer to exact payment from Sharp [the debtor] only by monthly instalments, and even if there should be a failure on the part of Sharp to pay as the instalments became due, the pursuer was not to be entitled to turn upon Sharp for immediate payment of the full debt, just as if an arrangement for payment by instalments had not been concluded. This, no doubt, was a limitation of the rights which, apart from contract with the defender, the pursuer might have exercised; but then the pursuer obtained, on the consideration for this surrender, an obligation from the defender to see paid as they became exigible the instalments by which payment of the debt had been promised."

The case of *Chisholm v. Alexander & Son* (July 19, 1882, First Division) serves to illustrate that a legal obligation to pay for the use of another's property may arise apart from any contract with him. The pursuer in this action was a sack contractor; the defenders had used his sacks, but seem to have obtained them through a railway company with whom alone it was alleged they had any contract. The pursuer furnished his sacks to the different stations of the company, but those using them were supplied with a copy of his conditions of hire. In his note the Lord Ordinary (Lee) remarks, "Even assuming no contract to be proved as between the pursuer and defenders directly, I am of opinion that the law implies an obligation in many cases, and in no case more frequently than in the hiring of moveables. . . . The fact that a subject is known to belong to another, and is to be had only upon hire, necessarily implies upon the part of any one who uses it in that knowledge an obligation to pay the hire; of course the hire must be certain or ascertainable by reference to a fixed standard. But it will not enable the hirer to escape liability that he had no direct communication with the proprietor of the subjects." The Inner House unanimously took the same view.

The case of *Greer v. The Stirling County Road Trustees* (July 7, 1882, Second Division) is of some public interest. A child of twenty-two months old was drowned in a burn in consequence of

falling over the side of the road into it. The road at this place was fenced with a paling, the posts of which were more than two feet apart. The child at the time of the accident was attended by another under four years of age. The Sheriff-Substitute found that the place was sufficiently fenced, and assoilzied on that ground. "In the view," he says, "which the Sheriff-Substitute takes of the duty of the defenders in fencing dangerous places and bridges, they are not bound to take precautions to protect children who may use them as a playground." The Sheriff, on the other hand, could not assent "to the proposition stated absolutely that road trustees in fulfilling their statutory duty of fencing a dangerous part of the road are not bound to have regard to the danger to children as well as other people." But then he thought that there was contributory negligence on the part of the child's parents. The majority of the Court of Session repelled the defence of the sufficiency of the bridge, holding that the Turnpike Act requires adequate means of security to be provided, and that these are not afforded "by a fence through which children may pass to the edge of the bridge with as great facility as if the bridge was entirely unfenced." The idea "that a mother, the wife of a labourer, cannot permit her child to go to the door unless under the guardianship of a grown-up nurse," was treated by Lord Craighill as extravagant. The defences were repelled and £40 awarded. Not, however, without a protest from Lord Young, whose dissents in this Division are as frequent as those of his venerable brother in the other. He agreed entirely with the Sheriff-Substitute, being of opinion that the trustees were not bound to render a road safe for infants even in the neighbourhood of a village. "An unattended child twenty-two months old could creep through the area railings of any street in a town. In short, the place was absolutely safe for passengers, and no more unsafe for infants unattended than any ordinary street in a town."

In the case of *Strang v. Brown & Son* (July 19, 1882, Second Division) a point relating to taxation was disposed of. Certain defenders in an action raised before the Sheriff were in the Court of Session assoilzied on one ground of defence only, two having been taken. The interlocutor found them entitled to expenses, subject to a modification of one-third of the expense of the proof in the Sheriff Court. The Auditor in dealing with the account first taxed off a portion as relating to a matter in which the defenders had failed, and afterwards proceeded to make a further deduction as the modification directed by the Court to be given effect to. It was, however, held that "the defenders were entitled to have the amount of their account of expenses taxed by the Auditor, on the footing that they had been successful on both grounds, and that the modification ordered by the interlocutor of the Court fell to be made thereafter."

CONTRACTS BY CORRESPONDENCE¹(From the "*Western Jurist*.")

General Considerations.—With the vast growth of the commercial interests of the country during the last fifty years the subject of contracts entered into by means of correspondence has become of very great importance. A large number of decisions, many of them conflicting, have accumulated. The difficulty in these cases appears to have grown out of an attempt to apply the old idea of mutual assent necessary to a contract to a new state of facts, arising under circumstances entirely different. It is customary to say that before there can be a contract, the minds of the parties must meet on some particular proposition with knowledge that they have met. This is true where the parties are personally present, but it can be true only in a modified sense where the parties are not personally present, but resort to the mail as a means of communication. Under such circumstances a strict and literal interpretation of the maxim is impossible. We have attempted to reduce the law on the subject to three principal propositions, now so generally acknowledged that we may call them rules: 1. As to when the contract is completed. 2. As to the power of recall. 3. As to what constitutes a sufficient acceptance to bind the parties.

RULE 1. *When an offer has been made, and a letter of acceptance mailed within a reasonable time, the contract is complete.* The adjudications upon this question begin with the case of *Adams v. Lindsell* decided in the Court of King's Bench in 1818. The defendants were dealers in wool at the town of St. Ives, and the plaintiffs were woollen manufacturers at Broomgrove. On the second day of September 1817 the defendants wrote and set out the following letter to the plaintiffs: "We now offer you eight hundred tods of weather fleeces of good, fair quality of our county wool, at 35s. 6d. per tod, to be delivered at Leicester, and to be weighed up by our agent in fourteen days, receiving your answer in course of post." The letter, through the fault of the defendant, was misdirected and did not reach its destination until September 5, when an answer accepting the terms was immediately despatched. This letter reached the defendants September 9. But on the 8th the defendants, not having received an answer on the 7th, as they should have, "in course of post," had their letter been properly directed, sold the wool to another party. Upon these facts the defendants argued that there was no contract, as there could be none until the letter of acceptance was received by them. As they had received no answer in due course of post, they had the right to withdraw their offer. By the sale of the wool to other parties they evidenced their intention of withdrawing the proposition made the plaintiff

¹ *Vide Journal of Jurisprudence*, vol. xxiv. p. 337.

before they received the letter of acceptance. Hence there was no simultaneous concurrence of the wills necessary to constitute a contract. The real question to be decided was whether the acceptance was complete when the letter of acceptance was deposited in the post. In passing upon this the Court said, "If this were not true, no contract could ever be completed by post. For if the defendants were not bound by their offer when accepted by the plaintiffs till the answer was received, then the plaintiffs ought not to be bound till they had received the notification that the defendants had received their answer, and assented to it. And so this might go on *ad infinitum*. The defendants must be considered in law as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter. Then as to the delay in notifying the acceptance, that arises entirely from the mistakes of the defendants, and it must therefore be taken as against them."

Four years later, in 1822, the case of *McCullough v. The Eagle Insurance Company* came before the Supreme Judicial Court of Massachusetts, and was decided directly contrary to the doctrine of *Adams v. Lindsell*. This case grew out of the following facts: On the 29th day of December 1820 the plaintiff wrote from Kennebeck, Maine, to the defendants at Boston, asking for the terms upon which they would insure a certain brig and cargo from Martinico to the United States. On the 1st day of January the defendants replied stating that they would take the risk at two and one-half per cent. This letter was received and answered by the plaintiff January 3rd, accepting the offer. But on the 2nd of January the defendants despatched a letter in which they withdrew their offer, and refused the risk at any price. But the letter of acceptance was mailed on the 3rd, before the receipt of the defendants' letter of revocation. The plaintiff claimed that the contract was complete, but Chief-Justice Parker, without knowledge of the decision in *Adams v. Lindsell*, held otherwise. "It is contended by the defendants," said he, "that the treaty was open until they should have received that letter, and that in the meantime they had a right to withdraw their offer. We adopt this opinion as the most reasonable. The offer did not bind the plaintiff until it was accepted; and it could not be accepted to the knowledge of the defendants until the letter announcing the acceptance was received, or at most until the regular time for its arrival by mail had elapsed.

The conflict thus begun was continued in 1830 by conflicting decisions in two cases decided almost simultaneously, one in New York, the other in Scotland. The New York case was *Mactier v. Frith*. Mactier lived in New York, and Frith in San Domingo. They were joint owners of a cargo of brandy which had been shipped on their account from France to New York. While the cargo was supposed to be at sea, Frith wrote to Mactier, proposing

that he (*Mactier*) should take the venture solely on his own account. This offer was accepted. After the letter of acceptance was mailed, but before its arrival, *Mactier* died, and his administrator claimed the property. The Court, following the doctrine of *Adams v. Lindsell*, held that there was a complete contract before the death of *Mactier*. The Scottish case referred to introduced a slightly different state of facts and a new element. Here an offer was accepted and the letter mailed, but later in the day the acceptor, having changed his mind, a letter containing a refusal was also mailed. Both letters went by the same post, and were placed in the hands of the other party at the same time. The Court of Session held that the acceptance was nothing until it was delivered, and as they were delivered at the same time, they neutralized each other and no contract was made. Thus far we find the decisions quite evenly divided. But a little later in *Brisford v. Boyd*, Chancellor Walworth held that where the subject-matter of the contract was burned after the letter of acceptance was mailed and before its delivery, the loss must fall upon the acceptor. In 1846 we again find the question before the English Courts of Chancery, in *Potter v. Sanders*, where *Mactier v. Frith* was approved, and *McCullough v. The Eagle Insurance Company* dissented from. On the other hand, in *Averill v. Hedge*, although the point did not directly arise, the Court took occasion to approve of the doctrine of *McCullough v. The Eagle Insurance Company*. In 1847 the Supreme Court of Pennsylvania gave its arbiter in favour of the doctrine in *Adams v. Lindsell*, saying, "The last case upon the point has overruled *McCullough v. The Eagle Insurance Company*." About the same time the Supreme Court of Georgia held that where the completion of a transaction depended upon the delivery of a document, depositing it in the post was sufficient.

Next in order of time we find the important case of *Dunlap v. Higgins*, decided in 1848. This was an appeal from the Scottish Court of Session to the House of Lords. On January 28 *Dunlap* wrote to *Higgins*, offering in terms to sell a lot of pig-iron. *Higgins* received the letter on the 30th of January, and on the same day wrote and posted a letter of acceptance. This letter, by mistake, was dated January 31, and through delay in the post it was not delivered until February 1. In the meantime, *Dunlap*, not hearing from *Higgins* on the 31st, made other arrangements, and upon receipt of *Higgins'* letter of acceptance, replied that it was too late, and there was no bargain. *Dunlap* thus virtually admitted that he was bound to wait until in due course of post an answer could come. He contended, however, that after having waited until that time, he was then released from all further obligation. Lord Chancellor Cottenham thought otherwise: "I cannot conceive how any doubt can exist upon the point. If a party does all that he can do, that is all that is called for. If there is a usage of trade to accept such an offer, and to forward it by means of the post, and if the party

accepting the offer puts his letter into the post on the correct day, has he not done everything he was bound to do? How can he be responsible for that over which he has no control? Common-sense tells us that transactions cannot go on without such a rule." This case virtually settled the question in England.

Two years later the Supreme Court of the United States reached the same conclusion in *Taylor v. The Merchants' Fire Insurance Company*. The agent of an insurance company in a letter dated December 2, 1844, offered to insure Taylor's dwelling-house upon stated terms. Taylor did not receive the letter until the 20th, it having been misdirected. Upon its receipt an acceptance was immediately mailed. The agent received this letter of acceptance on the 30th, but the building was destroyed by fire on the 22nd. The company claimed that there was no insurance, as the property had ceased to exist before they had acquired knowledge of the acceptance. The facts are almost identical with the Georgia case of *Levy v. Cohens*, and the conclusion reached was the same. Mr. Justice Nelson, in delivering the opinion of the Court, said, "On the acceptance of the terms proposed, transmitted by due course of mail to the company, the minds of the parties have met on the subject, in the mode contemplated at the time of entering upon the negotiation, and the contract becomes complete. The party to whom the proposal is addressed has the right to regard it as intended as a continuing offer, until it shall have reached him, and shall be in due time accepted or rejected."

Thompson v. James in its facts very much resembles *McCullough v. The Eagle Insurance Company*, the defence being—1. That a letter of recall or revocation was delivered to the plaintiff before the letter of acceptance was delivered to the defendant. 2. That a letter of recall was posted not only before the letter of acceptance was received, but before it was posted. It was contended that under the state of facts this could be no contract, and an elaborate attempt was made to support the defence. Thus the whole question of contracts *inter absentes* was brought before the Court, both as to the power of revocation and as to the time when an acceptance became effectual, and a contract complete. The authorities, ancient and modern, together with the *dicta* of the jurists and writers with weighty names of England, America, and continental Europe, were cited and discussed. In this, as in nearly all the cases, we can detect the same underlying conviction, that the decision must be more upon a ground of convenience and necessity than principle. Neither the metaphysical requirements of the civilians nor the rigid morality of the later jurists are of any avail as against the belief that "no contract *could ever be safely* proposed by letter if the acceptance must arrive before the contract is completed." Upon this ground more than upon principle it was held that the posting of the acceptance completed the contract and placed it beyond the power of either party to retract. The same

was held in *Harris's* case, and may be considered as an established rule of law.

RULE 2. *The recall of an offer sent by mail, in order to be of any effect, must reach the party to whom it is addressed before an acceptance is mailed.* The principle we have found applying to an acceptance does not apply to a recall. Something more than a mere posting of the letter is required. The two things are in their nature different. The one consists in effectually undoing something which the party himself has done, and which binds him until it is undone; the other consists in merely accepting a proposal. By putting a letter in the post office the acceptor has done all he was invited or required to do. There is a manifest difference in principle between abstaining from doing an act which would be necessary to be done before you could be held to have completed your act, and that which consists in a subsequent active interference for the purpose of undoing or counteracting the legal consequences of a thing you have already done. Hence it is necessary that a letter of recall, in order to revoke the previous offer, must not only be mailed, but also delivered to the other party before his acceptance has been written and mailed. It has been argued against this that where the party making the offer has changed his mind and posted his letter of recall before the offer was accepted, the intention to contract cannot be held to continue until the time of acceptance, and hence at no moment of time was there *in idem placitum consensus, atque conventis*, which is said to be essential to an action; that the change of mind prevented the completion of the contract, the same as the death or insanity of the offerer. But death and insanity are not acts of the will, and their effect does not rest upon a change of purpose. They intercept but do not revoke the transaction. The offer is considered as continuing with the letter until the time of its acceptance. The death or insanity of the party destroys the will altogether, and there plainly can be no contract. Revocation is an act of the offerer. Having communicated his offer to the other party, the offeree is entitled to regard that purpose as unchanged until the change is communicated to him. He has acquired a right which he will retain until it is actually withdrawn from him by a communication to that effect. Communicating a change of mind to a third party, or recording it in a formal writing, as a notarial instrument, is of no avail as against the acceptor. In these cases a binding contract may be made without that *consensus* or *concursus* which a literal reading of the maxim would require. The principle is clearly stated by the late president in *Thompson v. James*: "I hold that a simple, unconditional offer may be recalled at any time before acceptance, and that it may be so recalled by a letter transmitted by post; but I hold that the mere posting of a letter of recall does not make that letter effectual as a recall, so as from the moment of posting to prevent the completion of the contract by acceptance. An offer is nothing until it is communicated to the

party to whom it is made, and who is to decide whether he will or will not accept the offer. In like manner I think the recall or withdrawal of an offer that has been communicated, or may be assumed to have been communicated to the party holding the offer. An offer, pure and unconditional, puts it in the power of the party to whom it is addressed to accept the offer until by the lapse of a reasonable time he has lost the right, or until the party who has made the offer gives notice—that is, makes it known that he withdraws it. The purpose of the recall is to prevent the party to whom the offer was made from acting upon the offer by accepting it. This necessarily implies precommunication to the party who is to be so prevented."

In *Byrne v. Sienhoven* (5 C. P., Div. 344), decided in 1880, an offer was sent on the 1st of October and received on the 11th. An acceptance was immediately sent by telegram, and afterward by letter. It was held that the contract was complete and binding on both parties from the time the acceptance was sent by telegram, and that a letter of withdrawal posted by the offeror on the 8th, but which was not received by the offeree until the 20th, was of no effect.

RULE 3. *An acceptance, in order to complete a contract, must be unconditional and in accordance with the terms of the offer.* This proposition is supported by an unbroken line of decisions. The difficulty in all the cases is to determine whether certain letters form a contract. An early case of this kind was *Eliason v. Henshaw*, which was decided upon the following facts: A. wrote to B. offering to purchase three hundred barrels of flour, to be delivered at Georgetown by the first water, stating the price he would pay, and requested an answer to be sent *by the return of the waggon by which the letter was sent.* The waggon was at the time in the service of B., and was used by him in conveying flour from his mills to Harper's Ferry, near which place A. then was. The offer was accepted in a letter sent to Georgetown by the first mail, and was received by A. at that place, but no answer was ever sent to Harper's Ferry. This offer was certainly accepted unconditionally, but not quite in the terms of the offer. The answer was sent to Georgetown by mail instead of to Harper's Ferry by the waggon. The effect was the same, as A. received the letter. The Court held that there was not a contract. "It is an undeniable principle of the law of contracts," said Mr. Justice Washington, "that an offer of a bargain by one person to another imposes no obligation upon the former until it is accepted by the latter, according to the terms in which the offer was made. Any qualifications of, or departure from, the terms invalidates the offer—an acceptance communicated to a place different from that pointed out by the plaintiffs, imposes no obligation binding upon them."

In *Halland v. Eyre* the Vice-Chancellor said, "In order to constitute an agreement by letter, the answer to the written

proposal must be a simple acceptance of the terms proposed, without the introduction of a new and different term. The defendant proposes to give the sum mentioned in the letter for the lease of the house, by which this is to be understood to mean the lease which the plaintiff had, or was entitled to claim, from Mr. Barton (his lessor for a long term of years). The plaintiff in his answer does not consent to assign the lease from Mr. Barton on the terms proposed, but offers to grant an underlease on the same terms and clauses as the lease he holds from Mr. Barton. But the grant of an underlease is not the same thing as the assignment of an original lease; and the plaintiff's letter is not, therefore, an acceptance of the defendant's proposal, but introduces into the proposal a new and different term."

1. *Facts not constituting a contract.*—A. who was proposing to enter into the employ of B. as salesman, wrote to B. stating in detail the terms upon which he would be willing to contract. B. answered in the following letter: "Yours of yesterday embodies *the substance* of our conversation. If you can define some of the terms a little clearer it might prevent mistakes, but I think we are quite agreed on all; we shall, therefore, expect you on Monday." The last sentence certainly looks like an acceptance, and doubtless such was B.'s intention at the time. But it was held not to be a contract.

A. wrote to B. offering to take twenty guineas for a certain mare. B. wrote in answer, "I will take the mare at twenty guineas, *of course warranted*, therefore turn her out as my mare. Meet me at West Wycombe and I will pay at once." B. failed to be on hand with the money at this and two other appointments. He again wrote, "Of course I mean to have the mare. My son will be at the West End on Monday and pay you for her. Say in the receipt *sound, and quiet in harness.*" As answer to this A. wrote, "I will send the mare as desired, *she is warranted sound, and quiet in double harness.*" After a few days B. returned the mare as being unsound: *Held*, That there was no contract.

A. & Co. were commission merchants in Chicago. B. was their agent at Quincy. To secure consignments at that point A. & Co. made an arrangement with the bank by which the bank was to cash B.'s drafts on them. Thus matters continued until some difficulty arose, when A. & Co. sent the following letter to the bank: "Change, January 15, 1876. Hereafter we will pay no drafts only on actual consignments. We cannot advance money a week in advance of shipment. The stock must be in transit so as to meet drafts same day, or the day after presented to us. This letter will cancel all previous arrangements of letters of credit to B. Please acknowledge receipt of this." In reply the bank wrote: "Quincy, January 17, 1876. Your favour of the 15th received. We have never knowingly advanced any money to B. on stock to come in. Have always supposed it was in transit. Have

always taken his word. After this we will require ship's bill." This closed the correspondence. Soon after the business of the firm of A. & Co. passed into the hands of two clerks who knew of the correspondence, but was still conducted under the old name, and the bank had no knowledge of the change. B. finally decamped with the proceeds of a number of drafts, when it became important to ascertain whether the letter of the bank amounted to an acceptance. In order to see what these letters contain, note the following abstract. The original letter states: 1. In the future they will pay drafts only upon actual consignments of stock. 2. They would not pay money a week in advance of the shipments. 3. That the stock must be in transit. 4. That the letter was to cancel all previous letters of credit to B. 5. They ask an acknowledgment of the receipt of the letter. This was explicit enough. In reply the bank stated: 1. The letter was received. 2. Contents were noted. 3. That the bank had not knowingly advanced money to B. on stock to come in. 4. That they had always taken B.'s word. 5. That in the future they would require "ship's bills," meaning bills of lading. Upon this state of facts the Supreme Court held that there was no contract, as the bank intended to require the "ship's bills" for its own protection and not for the protection of A. & Co.

By the will of A. his brother was appointed executor, and named as the legatee in the will after the payment of all debts. Letters testamentary were granted to B., who gave bond with his two partners as sureties. B. loaned \$5000 of his brother's estate to the firm of which he was a member, and the firm subsequently failed. B. was removed from his trust as executor, and C. appointed in his stead. C. under the authority of the Court, compromised with and released B. as a debtor of the estate. The estate was represented as insolvent and commissioners were appointed to settle it. D., a creditor of the estate, whose claim remained unpaid, addressed a letter to B. respecting it. B. in his reply, after setting forth in detail the condition of the estate, said, "And now if I should have the ability, it will be the first act I shall perform to place in their [his creditors'] hands the amount which was lost by the firm of B. & Co., which would have paid to them not far from two-thirds of their several claims." D. brought a suit against B. on this letter, alleging a promise by B. to pay D.'s claim against the estate, and it was held that the action could not be maintained.

A. (October 20, 1862) wrote, "What will you sell me 450 kegs of nails for, delivered at Bangor in the course of a month, cash down?"

B. (October 23, 1862) wrote, "We will sell you 450 kegs common assorted nails, delivered on the dock at Bangor, at \$3.62 per keg of 100 pounds each, cash."

A. (October 27, 1862) wrote in reply, "Nails have advanced so much I am almost afraid to buy; but you will send me as soon as

possible 303 kegs, and I will send you a cheque on Exchange Bank, Boston."

A. (November 11, 1862) again wrote, "Not having heard whether you have shipped the nails ordered, I thought I would write you, as we shall have but a few weeks more of navigation."

B. (November 14, 1862) replied, "It will not be possible for us to get out the nails you have ordered this month, as previous orders must take precedence. It is next to impossible for us to get out nails enough to supply our back orders, and we thought it best to write you, as navigation may be closed too soon for us to forward them this fall. We will, however, do our best to satisfy all our customers, and your order shall receive attention when we get to it." The only variance between the offer and the acceptance was in the number of kegs. This was sufficient to show that the minds of the parties did not meet.

2. *Immaterial alteration.*—Where the variation between the acceptance and the offer is in regard to an immaterial matter, and will not introduce a new term into the agreement, it will not affect the contract. As, for example, where a proposal by a purchaser to take the remainder of a lease was announced by a letter which, after acceding to the proposition, added, "We hope to give you possession by next half-quarter day." So where an intended purchaser of property having made an offer for it, received an answer accepting the offer, and signifying a time for signing the contract, the purchaser's agent not having attended within the time mentioned, the vendor refused to complete the transaction. Naming a time for signing did not constitute a condition of acceptance, and hence the contract was completed. If the letters form in themselves a complete contract, they will take effect at once, notwithstanding a statement in the acceptance that a formal contract is to be drawn.

3. *Misunderstanding of the offer.*—Where there is a misunderstanding of the terms of the letter, as where there is an unconditional acceptance with an understanding different from that of the offerer, in regard to a thing, or part material, there is a lack of the requisite mutuality of assent and no contract is made. There is merely a negotiation resulting in a failure to agree. Abbott, C.J., left it to the jury to find whether such a misunderstanding actually occurred, "as a test of the existence of the contract." "Conceding," said Swayne, J., "that both parties have acted in good faith, it is clear that there was a misunderstanding between them as to the meaning and effect of the letter, and that the plaintiffs never understood and agreed to it as it is now interpreted and insisted upon by the defendants. The *aggregatis mentium* requisite to give that interpretation effect was, therefore, wanting."

Rebiew.

Le Droit de la Guerre et les Précurseurs de Grotius. Par ERNEST NYS, Bruxelles et Leipzig, Librairie Européenne. C. Muquardt, Merzbach et Falk, Éditeurs. 1882.

THIS work bears testimony on every page to the erudition and ability of its author. M. Nys does not give us his own speculations on the rights and duties of belligerents and neutrals, nor does he profess to place before the reader a view of the present state of opinion on these questions of international jurisprudence. His work is historical; his object is to explain the views on these subjects of the jurists who preceded Grotius, and compare them with the practice of the statesmen of the day. It is needless to say that such a task—to be performed with the thoroughness and detail of our author—implies no ordinary amount of labour and research; but the work produced is in a remarkable degree full of interest and instruction. Its perusal makes it clear that the peaceful efforts of jurists, so often ridiculed by men of action, have had an effect in largely modifying their opinions and practice, and suggest the hope that the science of international law may yet attain to greater certainty in its own doctrines and wider influence over the conduct of statesmen.

The book is divided into three chapters. The first traces the growth in the middle ages of the idea of international law in its modern sense, and discusses the political effects on society of the idea of universal monarchy as represented by the Papacy and the Empire.

Chapter ii. is subdivided into six sections. Section 1 summarizes the teaching of Christianity and the views of the Fathers on the subject of war, and the author points out that while the Church preached peace and moderation, the legitimacy of war in certain circumstances was never denied. Section 2 treats of the modes of settlement of international differences, and under the head of *Tentatives amiables*, or friendly efforts, several examples of arbitration from the twelfth to the fifteenth century are quoted. The subject of reprisals is also discussed and its origin and limits pointed out. The practice found many defenders and was largely employed both in war and as a means of enforcing civil claims. The principle is here condemned, but it appears to result not illogically from the theory which prevailed in the middle ages, that war was a relation not between states, but between individuals. Section 3 deals with the great calamity of the middle ages, private war, and details the efforts made to mitigate its evils. In England it was early checked by the great power of the Conqueror over his feudal nobility, but elsewhere it continued till the fifteenth and sixteenth centuries. Section 6 contains an interesting account of war as

carried on in feudal times. Every one is acquainted with the cruelty and savagery which marked the conflicts of those days; but it is gratifying to find that the predecessors of Grotius were unanimous in condemning the barbarous customs of their age. On the subject of the rights and duties of neutrals we can fortunately mark improvement in our own times. These rights and duties could hardly be said to exist. Non-belligerents were free to assist either side without endangering their position as neutrals. Many other points, such as standing armies, the keeping of faith with enemies, the rights of captivity and of ransom, are discussed by our author with all desirable clearness and fulness of detail.

The last chapter consists of notices of Lopez, Soto, Gentilis, Suarez, and the other publicists who preceded the illustrious Grotius. We commend the work of M. Nys as an able and most instructive discussion of the subjects treated by him in these pages.

The Month.

Mr. Mountague Bernard.—A career of great usefulness and distinction has been prematurely closed by the death of Mr. Mountague Bernard, which occurred on the 2nd ult. at his country residence, Overross, near Ross, in Herefordshire. Mr. Bernard had a severe illness in the spring, from which he never thoroughly rallied, and he had been sinking slowly for some weeks past. At the close he suffered little save from exhaustion and distressed breathing, and passed quietly away at five o'clock on the above date.

Mr. Bernard was the third son of Mr. Charles Bernard, of Eden, Jamaica, by Margaret Anne, daughter of Mr. John Baker, of Waresley House, Worcestershire, and was born at Tibberton Court, Gloucestershire, on the 28th of January 1820. After passing through Sherborne School, he became a scholar of Trinity College, Oxford, when the list of scholars included Mr. E. A. Freeman, Mr. S. Wayte, Mr. A. W. Haddan, Mr. R. W. Lingen, and the present Bishop of St. David's, whence he took a first class in classics and a second in mathematics in the year 1842. He afterwards graduated in law, obtained the Vinerian Scholarship and Fellowship, and was called to the Bar in May 1846 at Lincoln's Inn. He had the advantage of studying in the chambers of Mr. Palmer, now Lord Selborne, whose friendship he continued to enjoy, and with whom he was on several occasions associated, in after life.

Like many Oxford men of his standing, Mr. Bernard was deeply interested in ecclesiastical questions, and is understood to have had a principal share in founding the *Guardian* newspaper, and to have been for some years its editor. While still continuing the practice of his profession, he also found time for a more scientific survey of

law than was then at all usual, and was always a diligent student of history. In 1859 he returned to Oxford as the first occupant of the chair of International Law and Diplomacy, which had been founded out of the revenues of All Souls' College by the University Commissioners of 1854. International, or indeed any law, was twenty years ago but little studied at Oxford. The Professor could not therefore expect large classes, but he taught the teachers. Of the two methods of dealing with the subject, the historical and the systematic, Mr. Bernard was attracted to the former. He was quite at home in the intrigues which prelude the gathering of a great congress. He had thoroughly mastered, and could well describe, the characters of the chief actors in many a drama of European politics. His lectures on contemporary questions were often valuable monographs, some of which are collected in a volume entitled "Four Lectures on Subjects connected with Diplomacy," which appeared in 1868. His careful observation of the international aspects of the struggle in the United States resulted in a substantial treatise on "The Neutrality of Great Britain during the American Civil War," published in 1870. All the while he was discharging other useful and various academical functions, as examiner, member of the Hebdomadal Council, Delegate of the Press, and Assessor of the Chancellor's Court, in which last-named capacity it was his good fortune to be able to quash a charge of heresy brought against the Master of Balliol. He also took a leading part in assimilating the procedure of the Court, which had previously followed the practice of the civilians, to that of the Courts of Common Law.

It is more usual on the Continent than it has been for some centuries in this country to call academically accomplished jurists to the assistance of statesmen and practical diplomatists. But in 1871 Mr. Bernard was chosen to be one of the High Commissioners who eventually signed the Treaty of Washington. The critics of that instrument were disposed to hold Mr. Bernard largely responsible for its alleged deficiencies, but with no better reason than was afforded by one or two somewhat ungarded expressions used by him in a lecture given upon his return from America. He was immediately afterwards made a Privy Councillor, and a few months later a member of the Judicial Committee of the Council, and as such was one of the judges who decided the important case of *Sheppard v. Bennett*. He was promoted by his University to the degree of D.C.L. He had been some years previously elected by All Souls' College to be a fellow of that pleasant society. But the academical period in Mr. Bernard's history was drawing to a close. In 1872 he was again absent, having been appointed to assist Sir R. Palmer in presenting the British case to the Tribunal of Arbitration at Geneva. In 1874 he resigned his Professorship and left Oxford, visiting it henceforth only from time to time as social engagements or College business called him up to his rooms at

All Souls'. In 1868 he had been a member of the Commission on Naturalization and Allegiance, the report of which led to the abandonment of the time-honoured maxim of English law, *Nemo potest exuere patriam*. In 1874 he served on the Commission for inquiring into the duties of commanders of British vessels with reference to fugitive slaves; and in 1877 he was appointed a member of the University of Oxford Commission, under the Universities of Oxford and Cambridge Act of that year. Of this Commission his combination of legal knowledge and academical experience naturally made him, at any rate after Lord Selborne had become for the second time Lord Chancellor, the leading spirit. To him, as much as to Lord Selborne, is due the character of the compromise between the Colleges and the University which has now become the new constitution of Oxford. A large proportion of the complex code of statutes in which that compromise is embodied was drafted, and repeatedly redrafted by his own hand. The immense and anxious labour bestowed upon this work may indeed not improbably have undermined a never very robust constitution and hastened his end. His last effort was an explanation and defence of the new statutes, in the shape of a letter to Mr. Gladstone, published in the spring of this year.

Mr. Bernard's reputation was by no means confined to his own country. He was, of course, well known in America, and was one of the original members of the "Institut de Droit International" on its foundation in 1873. At the annual reunions of that body in various cities of Europe, his opinion carried much weight, though, in common with his English colleagues, he was little inclined to accept implicitly the dogmas most in favour with Continental jurists. When the "Institut" met at Oxford, two years ago, he naturally became the President of the year, supported by Neumann and Bluntschli, the latter of whom has also since been lost to science. The tact and *bonhomie* with which he discharged the duty of guiding a debate carried on in French by representative international lawyers of many countries will not soon be forgotten by those present. Mr. Bernard's pre-eminent mastery of the Law of Nations, first revealed by an admirable paper on "The Growth of the Laws and Usages of Warfare," in the "Oxford Essays" for 1856, had come to be recognised wherever the subject is studied. His literary style, without being specially happy or forcible, is always clear and judicious. He could be a charming companion, though a somewhat dry manner in general society hardly did justice to his real kindliness of disposition. He was generous, alike of time and money, for public objects. His singular fairness of mind, no doubt, occasionally inclined him to postpone the decision of pressing questions, and a somewhat fastidious taste indisposed him to the expression of any view which struck him as being extreme, but when once he had formed an opinion he resolutely carried it out to its consequences. He may be said to have worn

himself out in the conscientious discharge of duties which cannot be well discharged without exceptional qualifications, and are none the less important because they are not such as can obtain any wide recognition from the general public.—*Times*.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF CAITHNESS.

Sheriff THOMS and Sheriff-Substitute SPITTAL.

JOHN SWANSON v. ROBERT AND ALEXANDER MILLER.

Ship's husband trustee for owner as regards proceeds of a policy effected in ship-husband's individual name—Retention for owner's individual debt good against arrestment by other creditor of owner.—The facts of this case are set forth in the interlocutors pronounced in it. The first is by the Sheriff-Substitute (Spittal) and was pronounced after proof.

“*Wick, 21st February 1882.*—Having heard parties' procurators and considered the process, Finds that about four years ago Alexander Miller purchased the vessel Margaret Wood for the sum of £60, which sum he obtained by bill from Robert Miller, arrestee; that about two years ago the said Robert Miller undertook at the request of said Alexander Miller, and down to the loss of the said vessel continued to take, the chief management of the vessel, furnishing supplies for and making payments on account of the same; that said Robert Miller also supplied goods to the said Alexander Miller for his shop in Dunnet; that on 2nd March 1881 Robert Miller, with consent of Alexander Miller, insured said vessel in his own name for £100, paying the premium out of his own funds; that the vessel having been lost shortly thereafter, Robert Miller on 11th July 1881 received the sum of £99, 19s. 8d. of insurance money on said vessel, which sum he, with consent of Alexander Miller, applied on or before 12th August 1881 in extinction *pro tanto* of his claims in respect of his ship and shop accounts against Alexander Miller; that on 25th October 1881 the pursuer, Swanson, raised an action in the Debts Recovery Court at Thurso against the said Alexander Miller for the sum of £24, 12s. 1d. for furnishings for the said vessel, and on 3rd November 1881 obtained decree, and that on 3rd December 1881 he used arrestments in the hands of Robert Miller: Finds that at the date of said arrestment Robert Miller had not in his hands any funds or effects belonging to Alexander Miller: Assoillies the defenders from the conclusions of the action: Finds the defender Robert Miller entitled to £2, 2s. of expenses, and decerns.

CHARLES GREY SPITTAL.

“*Note.*—It appears to me that none of the decisions quoted by the pursuer apply in the circumstances of this case. The purchase of the vessel was made with Robert Miller's money. The insurance was effected by him in his own name, and when he received the insurance money he, with consent of Alexander Miller, applied it to pay off both the ship and shop debts. I do not think that he was in any way bound to look out for other creditors and communicate to them the benefit of the insurance. C. G. S.”

The pursuer appealed, appending the following note of legal authorities founded on: *Huntington Copper Co. v. Henderson*, 12th January 1877, 4 Rettie, 294; *Campbell v. Little*, 13th November 1823, 2 S. 484; *Miller v. M'Nair*, 6th July 1852, 14 D. 955; and *Dickson v. Nicolson*, 29th June 1855, 17 D. 1011.

The Sheriff (Thoms) pronounced this interlocutor :—

"*Wick, 24th March 1882.*—The Sheriff having considered the pursuer's appeal and whole process, Sustains said appeal, and recalls the interlocutor submitted to review: Finds that about four years ago the common debtor, Alexander Miller, purchased the vessel Margaret Wood for the sum of £60, which sum he obtained by bill from Robert Miller, arrestee; that about 26th February 1879, as per 19 of process, the said Robert Miller undertook at the request of the said Alexander Miller, and down to the loss of the said vessel continued to act as ship's husband of said vessel by taking the chief management of the vessel, and furnishing supplies for and making payments on account of the same; that on 2nd March 1881, Robert Miller, with consent and by authority of Alexander Miller, insured said vessel in his own name for £100, debiting the premiums thereon to the vessel, as per 19 of process; that the vessel having been lost shortly thereafter, the said Robert Miller, arrestee, on the 11th July 1881 received the sum of £99, 19s. 8d. of insurance money on said vessel; that the said Robert Miller, arrestee, was and is trustee as regards any balance of said insurance money for the said Alexander Miller, the owner of said vessel, after debiting it with what of the price thereof remained unpaid, and with payments strictly connected with supplies and furnishings for the ship: And in respect the pass-book No. 19 of process contains entries of other charges to the debit of said balance, appoints Robert Miller, the arrestee, within ten days from the date of this interlocutor to lodge in process a state showing the balance made up on the above footing: And allows the pursuer to see said state, and to lodge objections thereto within ten days thereafter: Reserving meanwhile all questions as to vouching said state and who may be entitled to be paid out of the balance to be fixed by the Court, and also of expenses. GEO. H. THOMS.

"*Note.*—The Sheriff has taken the above mode of getting the balance fixed without incurring the expense of a remit to an accountant. The Sheriff, while he gives effect to the arrestee's right of retention as regards any part of the price of the vessel due to him, considers it a grave question whether he can exercise that right of retention in his own favour for the goods supplied to Alexander Miller, the common debtor, for his shop at Dunnet as against creditors of the ship for furnishings and supplies. That question may be avoided when it is seen how the accounting stands, and if not, it will be argued and disposed of.

"G. H. T."

"*Wick, 29th March 1882.*—Statement ordered by the foregoing interlocutor lodged of this date. JAS. CAMPBELL, S.C.D."

"*Wick, 3rd April 1882.*—The Sheriff having considered the statement No. 28 of process and objections thereto for the pursuer, Remits these to Mr. William Paterson Smith, banker, Wick, in order that he may report the balance (if any) due by the arrestee after payment of what of the price of the ship is still due him; with power to the reporter to call for all documents and vouchers necessary; said report to be lodged *quam primum*.

"GEO. H. THOMS.

"*Note.*—This remit has been rendered necessary by the arrestee's statement not being in conformity with the order in last interlocutor. G. H. T."

"*Wick, 12th April 1882.*—Report ordered by the foregoing interlocutor, lodged of this date. JAS. CAMPBELL, S.C.D."

"*Wick, 17th April 1882.*—The Sheriff having considered the report of Mr. W. Paterson Smith, Allows it to be seen by the parties, and them to object thereto if so advised, the pursuer within eight days from the date of this interlocutor, and the arrestee by the first sederunt day in May next; and appoints these objections and the cause thereafter to be debated before and disposed of by the Sheriff-Substitute. GEO. H. THOMS."

"*Wick, 2nd May 1882.*—No objections lodged.

"CHARLES GREY SPITTAL."

"*Wick, 2nd May 1882.*—Parties' procurators heard. Avizandum.

"CHARLES GREY SPITTAL."

"*Wick, 9th May 1882.*—Having again considered the process of new, Finds that at the date of pursuer's arrestment the arrestee, Robert Miller, had not in his hands any funds or effects belonging to Alexander Miller: Assoizlies the defenders from the conclusions of the action: Finds the defender Robert Miller entitled to £2, 2s. of expenses, and finds the reporter, William Paterson Smith, entitled to £1, 1s., both sums payable by pursuer, and decerns.

"CHARLES GREY SPITTAL."

On the pursuer again appealing, the Sheriff reversed by this interlocutor:—

"*Wick, 19th May 1882.*—The Sheriff having considered the pursuer's appeal and whole process, Sustains said appeal, and recalls the interlocutor submitted to review: In respect of no objections by Robert Miller, arrestee, approves of the report by Mr. Smith, No. 52 of process, and in terms thereof finds that the balance remaining in the hands of the arrestee after debiting the ship account with the payments mentioned in the Sheriff's interlocutor of 24th March last is £38, 13s. 8½d., and that this balance is available to the creditors of the common debtor, Alexander Miller: Finds that the pursuer, as a creditor of the common debtor, validly arrested this fund on 3rd December 1881 to the extent of £24, 12s. 1½d.: Finds that the common debtor at that date was indebted to the arrestee, Robert Miller, in the sum of £46, 19s. 11½d., as per said report, and that in respect thereof he claims to retain said balance: Finds that the arrestee, Robert Miller, is entitled to exercise the right of retention of said balance so claimed as against the said arrestment, and therefore assoilzies the defenders, the said Robert Miller, arrestee, and Alexander Miller, common debtor, from the conclusions of this action: Finds, in respect of his conduct anterior to this action, his failure in both the appeals and the report which he has rendered necessary, the defender Robert Miller, arrestee, liable to pay to the reporter the sum of £1, 1s. as his fee, and to the pursuer, John Swanson, the sum of £2 as expenses of process and of 10s. as a sum modified for postages and actual outlays, and decerns.

GEO. H. THOMES."

Act.—Nimmo.—*Alt.*—Leith.

SHERIFF COURT OF LANARKSHIRE.

Sheriff LEES.

Maryhill School Board v. Barony Parochial Board—*School fees of poor parent's children*—*Form of inquiry*—*Education Acts, 1872 and 1878.*—*Held:* There are no means under the Summary Procedure Act of conducting an inquiry as to the duty of a parochial board to pay school fees for a parent who cannot do so, but that it is to be conducted in a summary form. By the 69th section of the Education Act of 1872 it is provided that "it shall be the duty of every parent to provide elementary education in reading, writing, and arithmetic for his children between five and thirteen years of age, and if unable from poverty to pay therefor, to apply to the parochial board of the parish or burgh in which he resides, and it shall be the duty of the said board to pay out of the poor fund the ordinary and reasonable fees for the elementary education of every such child, or such part of such fees as the parent shall be unable to pay in the event of such board being satisfied of the inability of the parent to pay such fees." By the 22nd section of the Education Act of 1878 it is enacted that "if a parent is unable from poverty to pay for the elementary education in reading, writing, and arithmetic of his child or children between five and thirteen years of age, and if, upon application, the parochial board of the parish or burgh in which he resides refuses to pay out of the poor fund the ordinary and reasonable fees of such child or children, it shall be the duty of the school board to apply to the Sheriff, who, after inquiry, may, if he shall think fit, grant an

order on such parochial board to pay the said fees, and such order may dispose of all question of expense." And by section 23 it is provided that "any prosecution for penalties or other proceedings under the principal Act or this Act may take place before the Sheriff (whose judgment shall be final) under the provisions of the Summary Procedure Act, 1864, and in all proceedings under the principal Act or this Act any person appointed by the school board, or any inspector or sub-inspector of factories, workshops, or mines, may appear before the Sheriff and conduct such proceedings. . . . Any prosecution for penalties under the principal Act or this Act which may take place before the Sheriff may take place also before any two justices of the peace sitting in open court, and any order which under this Act may be made by the Sheriff may be made by such justices, whose judgments and orders shall be final, and not subject to review." The defenders having refused to pay the school fees of the children of a parent who on the ground of poverty had applied to them to do so, the pursuers brought an action against them, under the Summary Procedure Act, to have them ordained to pay the ordinary and reasonable fees, which action was dismissed. The pursuers then raised the present action in the Ordinary Court, and the Sheriff-Substitute pronounced the following interlocutor:—

"Glasgow, 6th August 1882.—Appoints parties to attend the Sheriff-Substitute in chambers on Tuesday, 10th October, at half-past two o'clock; and grants diligence against witnesses and havers to both parties for said diet.

"J. M. LEES.

"Note.—It is somewhat difficult and probably somewhat important to decide what is the course of procedure to be followed in conducting the inquiry which the pursuers ask. The 22nd section of the statute founded on declares that if a parent is unable from poverty to pay for his children's education, and the parochial board refuses his application to pay the necessary fees, 'it shall be the duty of the school board to apply to the Sheriff, who, after inquiry, may, if he shall think fit, grant an order on such parochial board to pay the said fees, and such order may dispose of all question of expense.' The phraseology employed does not seem to me to contemplate an ordinary action in the Ordinary Court. 'Inquiry' is the word that is wont to be used where the person before whom it takes place exercises his discretion as to the form in which it is to be conducted. It is the term that frequently is applied to the procedure before a Sheriff in the exercise of his administrative jurisdiction, as, for example, under Sanitary and Police Acts. Under the statute in question the word is used in four places in regard to procedure of an investigating and not a litigious nature. (See sections 29, 30, 31, and 33.) I should therefore think that the Legislature did not intend the inquiry to be conducted in the form of an ordinary action with its rigidity of process, expense, and susceptibility of delay and of appeal. Indeed it is open to consideration whether the fees are to be made the subject of decerniture, and are not left to be recovered by Small Debt action if necessary.

"But there are some provisions in the next section that make the intention of the Legislature in regard to the procedure sufficiently clear. Firstly, an agent is not required; any person appointed by the school board is authorized to appear. Secondly, the judgment of the Sheriff or Sheriff-Substitute is to be final. Thirdly, it may be given under the provisions of the Summary Procedure Act. And fourthly, any two justices may pronounce the order.

"If this application could be disposed of under the Summary Procedure Act, the statute intends it should be so. Any proceeding under the Act that can be tried under the Summary Procedure Act is to be so tried.

"Now, so far as I can find, there are seven proceedings that can be brought before the Sheriff under the two Education Acts. Four of these are for contraventions of the Act, that is, for statutory offences, namely, failure of a parent to provide elementary education for his children, employment of a child in contravention of the Act, refusing admission to the officer of a school board

when authorized by the Sheriff to examine a place of employment, and false representation of a child's age. For each of these contraventions a penalty is imposed. They can therefore be tried under the provisions of the Summary Procedure Act.

"The fifth proceeding that may occur under the Education Acts is the determining of a dispute regarding an election. That, it is directed, the Sheriff shall dispose of summarily. Then there is the removal of a teacher for criminal conduct, or cruel or improper treatment of his scholars. That is obviously of the nature of a criminal cause, and special provisions are made as to the procedure in conducting it, and the Sheriff's judgment is to be final.

"The first four proceedings can thus be heard before a sheriff or two justices, the last two before a sheriff alone. But all are to be disposed of summarily.

"The seventh proceeding is an application of the character of that now made. There is nothing in its nature which is against the idea of its being tried summarily. It is, on the contrary, reasonable it should be so treated; and the terms of the statute and the analogy of other proceedings support this view.

"The pursuers accordingly brought an application under the Summary Procedure Act before Sheriff Balfour, but he, I understand, decided that there were no means of so dealing with it. Higher courts have found the same difficulty in regard to the application of the Summary Procedure Act. (See *Holland v. The Gauchalland Coal Co.*, Dec. 24, 1867, 40 J. 102; and *Wilson v. Stirling*, March 9, 1874, 1 R. (C. of J.) 8.) The truth, I suspect, is that the draftsman of the statute at present in question fancied that the English and Scotch Summary Jurisdictions Statutes were similar. But that is not so; for, apart from other differences, while the Scotch statute applies to the trial of statutory and common law offences and the recovery of penalties, the English statute includes also all cases in which a complaint is made to any justice on which he has authority in law to make any order for the payment of money. No doubt there is in the Summary Procedure Act a provision for pronouncing a judgment *ad factum præstandum*; but that expressly does not cover such a case as the present, for it applies to the doing of an act other than the payment of money (which is the object of the present application), and which can be enforced by imprisonment. Nor has the 28th section any bearing on the case, for it only supplies the criterion for deciding what is to be the appellate court of review in certain cases. (See the opinion of the Lord Justice-Clerk in *Louison v. Forfar Police Commissioners*, 4 R. (C. of J.) 1.) The Summary Procedure Act, too, has to do with an order to pay a specific sum. Here the order, if granted, would be to pay what the statute terms 'the ordinary and reasonable fees' of the children needing education. And lastly, I would remark the order is to pay the fees, not to pay a penalty for wrongously withholding them. It is plain, therefore, the Summary Procedure Act does not furnish a suitable framework for giving effect to this clause of the Education Act.

"But though the case cannot be disposed of under that Act, is there any good reason why the obvious intention of the Legislature that the case should be tried summarily should not receive effect? I think there is no serious difficulty in the matter. The Court of Justiciary in *Wilson's* case above referred to, though they refused to say an application of that kind under the Industrial Schools Act could competently be brought under the Summary Procedure Act as provided, would not say it was incompetent. And in *Holland's* case the Lord Justice-General remarked, 'The Summary Procedure (Scotland) Act, 1864, provides machinery for the recovery of penalties and expenses, but none for the recovery of compensation, and that for the very good reason that at its date there were no Acts in force under which compensation could be awarded.' But at the same time he thought the code of directions as to putting into force orders for payment of money provided by that Act could be made use of.

"The Summary Procedure Act deals largely with the recovery of statutory penalties, and it sanctions procedure for the recovery of penalties even where

the Act prescribing the penalty is silent as to how it is to be recovered. Now in the case of *The Local Authority of Selkirk v. Brodie* (March 16, 1877, 1 R. (C. of J.) 21) the majority of the Court held the expense incurred by the Local Authority in certain sanitary matters was 'a sum of money in the nature of a penalty.' But I think it must be conceded that that case does not rule the present one. Strictly speaking, a penalty is in a criminal court a sum of discretionary amount imposed for non-payment of some other sum of fixed amount, or for doing something forbidden, or for not doing something required. Here the matter is practically a review of the judgment that the Parochial Board came to in the exercise of their official duty. Then, too, the amount is as yet indefinite. And further, imprisonment of the defenders is out of the question; but in the Selkirk case it was competent, and that was a matter which was thought of importance.

"That it is possible in some cases to pronounce an order under the Summary Procedure Act is no doubt true, as, e.g. an order under section 5 of the Trout Fishing Act of 1860. But the difficulty in this case is more akin to that in *Wilson's* case, and that is the practicability of employing the Act. The real difficulty is not the form of the initial writ: it is the course to be followed after the case is in Court. Now it has been held that an application for a *fugæ* warrant or a decree of a *cessio* ought to be in the form prescribed by the Sheriff Courts Act of 1876 (*M'Dermott v. Ramsay*, 4 R. 217; and *Crosier v. Macfarlane*, 5 R. 936). An application in regard to a breach of interdict comes under the same rule, and so do other matters of a summary nature. But in these cases there are not of necessity defences, nor a closed record and other procedure as in an Ordinary Court case. A somewhat similar course would fall to be taken here. The first warrant, as it appears to me, would be not the warrant of the Act of 1876, but the familiar summary warrant appointing the parties to meet the Sheriff at a certain diet, and then the Sheriff would hold the party not appearing as confessed, or note any defence tendered, and hear witnesses as in a summary procedure case. The analogy of *Anderson v. Cooper* (7th March 1868) and *Wright v. Bowers* (3 Coup. 99) is adverse to the idea that a note of the evidence could competently be taken, and indeed there would be no use in taking it, for appeal is expressly excluded.

"I am afraid the 52nd section of the Act of 1876 as to summary trials is not in point directly, for it applies to cases where the statute expressly disallows a record and a note of evidence, and to cases where practice has so fixed this course of procedure. But here the statute is silent as to record and evidence, and there can be no practice where this is apparently the first case of the kind.

"Where, however, what one is directed to hold is an inquiry, and where the course specified in the Summary Procedure Act is indicated as the guiding course, it seems to me a Sheriff's duty is in accordance with the spirit of the Lord Justice-General's remarks in *Holland's* case, to adopt a summary procedure of the character indicated.

"But it may be said that in an analogous class of cases, namely, where a person claims relief on the score of poverty, which the parochial board refuses to give, the case goes through the routine of an Ordinary Court case. Well, it does so; but that is in deference to the express directions to that effect of an Act of Sederunt which followed on a comprehensive piece of recent legislation. There, too, the relief embraced more serious matters than a case of the present kind. Here the aid is at most for a few years; there it might be for a lifetime. Here it is measured by shillings; there by pounds. Here actual poverty is the sole issue; their lunacy, health, dependents, and other matters might frequently be involved.

"I think it is therefore clear on every consideration that the present application is not to be dealt with under Ordinary Court procedure, but by a summary inquiry; and as the school holidays render haste unnecessary, on the parties' suggestion I have deferred making the inquiry till an early diet in the winter session.

J. M. L."

Act.—Coats.—*Alt.*—Lamond.

PERTH SMALL DEBT COURT.

Sheriff BARCLAY.

CHARLES FOY v. THE NORTH BRITISH RAILWAY COMPANY.

Railway—Damages for detention.—The Sheriff-Substitute's notes fully state the facts of the case.

"This is a claim at the instance of 'Charles Foy, public entertainer, 86 High Street, Perth, against the North British Railway Company, carrying on business in Perth, for £12,' on the following statement: '£12, being restricted loss and damage sustained by the pursuer in consequence of the defenders having contracted with the pursuer to convey him and his company, who were to give what was styled a grand comic entertainment in the Town Hall of St. Andrews, to that town by the train starting from Perth on or about 4.35 o'clock in the afternoon of the 6th day of January 1882, and which train is timed to arrive at St. Andrews at or about 7 o'clock P.M., but which train on said 6th January did not, through the fault or negligence of the defenders or those for whom they are responsible, arrive until 8.40 P.M., in consequence of which undue and culpable delay in the transit of the pursuer and his company he was unable to hold said entertainment, and the assemblage of persons who had collected had dispersed, whereby the pursuer sustained loss and damage to the extent above claimed.'

"The facts are, the pursuer had an entertainment duly advertised to be held at St. Andrews at 8 o'clock in the evening of Friday, 6th January 1882. The pursuer and his company paid their fares and received tickets for St. Andrews, and took their seats in the train which left Perth at 4.35 and was timed in the Company's advertisements to arrive at 7 o'clock at St. Andrews, which was in sufficient, but not very ample time for the advertised entertainment at 8 o'clock. On that day it is proved that there was a severe storm. The train left Perth at proper time, but was twelve minutes past its usual time of arrival at Ladybank. There was a further delay of twenty-nine minutes there waiting for the train from Edinburgh, which had been delayed at the Granton Ferry, and the pursuer arrived at Leuchars at 7.10 instead of 6.10. Up to this time the pursuer did not complain, and still does not found his complaint on this delay. The train was advertised to leave Leuchars for St. Andrews at 6.45, and on that night it did not leave until 8.20, reaching St. Andrews at 8.40. The defenders rely on the three notices prefixed to their large time-tables in the following words: '*Trains.*—The times shown in these tables are those at which the Company's trains are *intended* to depart from and arrive at the various stations, and every exertion will be used to obtain punctual observance of the times shown, although the Company will not guarantee those times being kept under all circumstances, nor will they hold themselves responsible for delay or any consequences arising therefrom. But such times are so appointed subject to such alteration or change thereon as the Company or any other Company concerned may consider it proper to make, and the Company and the other Companies concerned retain the right to make such alterations or changes in the times of the trains without being responsible for the consequences thereof of any kind to any person travelling or intending to travel thereby. The Company's trains will ordinarily await the arrival of such trains from other lines as are connected therewith in these tables, but they reserve the right, in the event of their main-line trains being delayed either from this or any other cause beyond their control, to *despatch the branch-line trains from the respective junctions at the advertised hours or before the arrival of the main-line trains, according to the particular circumstances of the case.*' It may be observed here that these notices cannot form part of the special contract between the Company and travellers unless they are brought under the notice of the public and especially of the hirer. So far as they are reasonable stipulations they may be binding on both parties, but so far as unreasonable they cannot avoid positive contract and damage. The time-tables do bind the Company to place a party

paying for a certain journey to be placed at his destination at the specific time or nearly so. But there must exist in all contracts the exception of material accident, or elementary interference, or such accidental obstructions, which it was impossible to foresee or obviate. The pursuer admits the existence of the storm, but maintains that, notwithstanding, he having arrived at Leuchars at 7.10, could and should, in terms of the rules, have been despatched by the branch line, their own property, to St. Andrews, to have arrived there before 8. A train did leave Leuchars at 6.47, and which, according to the rules above quoted, could and should have been delayed until the arrival of the Perth train, which arrived with the pursuer at 7.10, only about twenty minutes more. Or again, that the train which arrived at Leuchars at 7.40 could have been accelerated and despatched to St. Andrews before 8.20, and not to have awaited the train from Dundee. This was actually the case provided for by the rules above noticed, either to accelerate or delay branch rails to meet the main lines. The distance between Leuchars and St. Andrews is only ten minutes by rail, and telegraph intelligence could be had of the passage of trains and their expected arrivals at branches. It was stated that the pursuer and his company actually took their seats in the 7.40 train, but that he made no complaint as to its delay until 8.10. There was a conflict of evidence as to this, but having been allowed to take their seats, the passengers were certainly entitled to presume they were immediately to have been carried on their journey. They should have been informed that they must await the arrival of the Dundee train. The distance is so trifling that there was ample time for the train to have made its journey and returned, and thus avoided all complaint. Had this intimation been made, as it ought, to the passengers, they might have taken the road with a vehicle, which then would have been the measure of the loss and damage.

"Therefore the defenders appear responsible for the loss occasioned the pursuer by the failure of his advertised entertainment. The defenders plead that the measure of damage is according to the profit which would have been obtained by the assemblage, and that as there was only £4 admittedly collected and returned to the assembled audience, this would be the correct figure of the damage sustained. The answer seems partly sound, that the hour having come, and no entertainer arrived, the public would not longer flock together to be disappointed. This perhaps is not altogether a sufficient answer, as it is rather to be taken that the audience would assemble at the appointed hour. The night being inclement, there is a reasonable presumption of empty boxes, as families might prefer on such a night the fireside to less comfortable though more exciting scenes.

"The items of damage are somewhat various, and embrace very indirect and remote loss. The hall-rent is stated at £2, 2s., which appears high for such an academic city as St. Andrews, and it might be expected could scarcely in the circumstances be wholly exacted. The railway fares, rendered unproductive, seem a just charge. £2 for advertising and bills seem somewhat high. £9 for balance of five artistes or entertainers for one night appear somewhat excessive when contrasted with other professions. The true estimate of loss appears to be the actual gain which would have been made had the entertainment taken place at the advertised hour. Upon the whole, the Sheriff-Substitute thinks he does ample justice to both parties by assessing the damages for that unfortunate night at £5, 10s. 6d., including costs, for which decree will be entered.

"The Sheriff-Substitute in this as well as in some similar cases has observed that travellers often leave themselves a very narrow margin of time to meet their engagements and any accidental delays. This almost amounts to contributory negligence. Here at the best the pursuer only left one hour to meet his performance advertised for St. Andrews. He excused himself by stating that on the previous night he had been detecting the people of Crieff and could not have reached Perth for an earlier train to St. Andrews. The Sheriff-Substitute still entertains some doubt if this is altogether a sufficient excuse.

"H. B."

THE JOURNAL OF JURISPRUDENCE.

THE LAW OF HOMICIDE IN SCOTLAND.

II.

It is Thackeray, if we recollect aright, who remarks somewhere that the worst use to which you can put a man is to hang him. The observation is undoubtedly a just one, but it is singular that so many should have imagined that they found in it a conclusive argument against capital punishment. It is a poor use to make of a bullock to bury its carcass in the ground; but if the beast be a victim of *pleuro-pneumonia*, the deeper we lay it the better. Wretched, indeed, is the man who is fitted for no higher function than to dangle upon the gallows; but if there be found in him no promise of a nobler usefulness, and if the continuation of his life be fraught with danger to society, then let the miserable creature be at least put to *some* use, albeit it be the very "worst to which you can put a man."

The agitation against capital punishment seems for the present, at all events, to have spent its force. The times are against it. People are prone to forget their squeamishness in the presence of Kerry assassinations and Wimbledon poisonings. Without the aid of sentiment such an agitation can make little headway, but even in serious argument the strength of the position taken up by those who advocate the total abolition of capital punishment has been seriously weakened within the last few years. Ten years ago we were told that the effect of the abolition of this form of punishment would be not to increase but to diminish the number of murders. Experience has proved the contrary. The experiment has been tried in Switzerland and elsewhere, and has proved a failure. Remove all fear of a death sentence, and the number of murders rapidly increases. For the present this would seem to be absolutely conclusive of the matter. To many indeed it may seem that, quite

apart from the preventive end of punishment, such crimes as the Phoenix Park and the Connemara murders cry to Heaven for blood, and that the infliction of any punishment short of death in such cases would be an outrage no less upon the dignity than upon the feelings of humanity. Such questions, however, may rest for the present. As human society is at present constituted, it is only by capital punishment that murder can be kept down; and therefore it would seem to follow conclusively that for the present, at least, capital punishment must be maintained as the penalty of wilful murder. But though we are obliged to retain this form of punishment in our Statute-Book, and sometimes to carry it out to the bitter end, it is with extreme reluctance that we do so. The days in which hanging was a mere matter of course, an incident of police administration, are happily past. We recognise the tremendous responsibility attached to the deliberate taking away of human life. We hang with reluctance, and we hang only for one offence. What, then, is this offence? How shall we exactly and accurately hedge it round and define it? for surely if exactitude and accuracy be anywhere required it is here.

In a previous article we endeavoured to indicate how extremely unsatisfactory is the present state of matters in this regard, how completely the practice of juries is divorced from the theory of the law. This divorce, as was there pointed out, is the result of a gradual change of public opinion as to what constitutes the crime of wilful murder justly dooming a man to death. It was shown that this change has left matters in a state far from satisfactory, through the failure of the makers and interpreters of the law to modify it in accordance with the growth of public opinion; but the question remained, how far that change was in itself a wise and necessary one, and in what form its results ought to be formally and authoritatively sanctioned by the Legislature.

The mere taking away of human life, even though the deed be done in circumstances which render its author amenable to criminal prosecution, does not necessarily constitute the crime of murder. From the days of the cities of refuge to the present the laws of every civilized country have recognised degrees of guilt in this matter. There is a gulf between the guilt of a man who takes away a life by turning a corner too quick in driving, and that of the midnight assassin who massacres women and children in their beds; and it would be monstrous to include the two offences under the same category of crime. The surprising thing, indeed, is that there is nothing between; that a moment's carelessness, a hasty push, or playful jest may inculcate a man in a crime only one step removed, as it were, from the most atrocious crime of which the greatest criminal is capable. The two crimes of culpable homicide and murder, in fact, merge almost insensibly into one another, and the change which for some time has been going on has been a gradual moving higher up of the dividing line. Culpable homicide,

like a rising tide, has gradually encroached upon and submerged much of the territory which was previously occupied by murder. The connotation of the former term has increased, that of the latter diminished. Speaking generally, culpable homicide was formerly the taking away of human life either (1) by carelessness, (2) by violence of a character not calculated in ordinary circumstances to destroy life, or (3) by violence under considerable provocation. Nowadays, however, a man may take away human life without any provocation, and with the most atrocious violence, and his crime is only culpable homicide, provided it does not appear that, whilst in a sober state, he deliberately resolved to commit the crime. The question which here falls to be considered is whether or not there are any good and sufficient grounds for this change.

Capital punishment is sometimes necessary, and must therefore be maintained; but none the less is it most desirable that the execution of capital punishment should be an event of rare occurrence, that this dread penalty should never be imposed except where its infliction is absolutely essential to the public security. Now there is a class of crimes which by the law of the land are still regarded as murder, in respect of which capital punishment does not seem to be necessary, and should therefore be abolished. We refer to homicides of that class which in a previous article we described as "Glasgow murders," those cases in which a man in the excitement of drink commits a crime of fatal violence, from which in his sober senses he would have shrunk with horror. We are not concerned to inquire whether death be a form of punishment too severe for such an offence. Wide as is the gulf between the guilt of the man who commits such a crime and that of the man who, say, deliberately poisons another from motives of revenge or gain, it by no means follows that because death is the appropriate punishment for the latter offence, therefore death must be too severe a penalty for the former. It may be that even the punishment of death is inadequate for the offence of the poisoner, and that he gets no worse merely because no severer form of punishment is known to civilized society. This is a question, however, which does not concern either the lawyer or the legislator. The sole question with which they are concerned in considering the matter is, whether or not the maintenance of capital punishment for certain classes of crime is necessary for the public good. The aim of the lawmaker should be to devise forms and degrees of punishment which shall provoke the *maximum* of preventive terror with the *minimum* of public sympathy for the criminal, and it is because the infliction of the punishment of death for a homicide committed in a frenzy of drunken violence is calculated to provoke exactly the reverse—a *minimum* of preventive terror with a *maximum* of public sympathy for the prisoner—that we are of opinion that death should no longer continue to be the punishment of such offences. It is quite certain that no man was ever restrained

from taking drink by the fear of the scaffold, and once he is fairly in the drinking-bout, he hardly knows what he is doing, still less measures the consequences of his actions. It may, indeed, occasionally happen that the man who is kicking his wife to death in his drunken fury is in a dim way conscious of what he is about, and it is not inconceivable that a vision of the scaffold looming dimly before his drunken eyes may sometimes exercise a restraining influence upon the violence of his meaningless rage; but such an event is at best improbable. We do not say that the fear of the death punishment can *never* exercise a preventive influence in such cases, but its operation is uncertain and likely to be but feeble. On the other hand, it is well established that, however revolting the crime of which he has been guilty, public sympathy is sure to be awakened on behalf of the man who is doomed to die for a crime which he never planned, and for which, from the moment he realized that he had committed it, he has been filled with the deepest horror and remorse.

Now, if capital punishment is to be maintained at all, it must be maintained with the popular sanction and approval. As the popularity of crime may make hanging odious (witness the recent cases of Hynes and Walsh in Ireland), so the odiousness of hanging, if it does not render crime popular, diverts from it public horror and indignation, and transfers popular sympathy from the victim to the perpetrator of the offence. We are of opinion that the cases in which capital punishment falls to be inflicted ought to be restricted, not because we disapprove of capital punishment, but, on the contrary, because we believe the maintenance of capital punishment to be necessary for the public security. Only with the sanction of the public can this form of punishment be maintained, and that sanction cannot long be secured if the punishment be inflicted in cases where its execution shocks the public sentiment.

There is, indeed, a theoretical objection to the removal of crimes of the class above referred to from the category of wilful murder involving the punishment of death, viz. that the law has always refused to recognise that drunkenness is any excuse for crime. Now, undoubtedly if drunkenness is to be admitted to any extent as an excuse or palliation of crime, this must be done with extreme caution, or everybody—to quote a plea we have once or twice heard offered at Glasgow Circuit—would be “drunk when I’s done it.” In homicide cases, however, there could seldom be any risk of a serious miscarriage of justice. When, as so often happens, a man addicted to drink, and who had been seen drinking on the day in question, has proceeded without any rational motive to kick to death a female relative with whom he had no serious quarrel, and for whom he has hitherto entertained no feelings other than those of affection more or less warm, it is morally certain that the man was drunk when he did it. In a recent murder trial at Glasgow, Lord Young suggested that though drunkenness was no relevant defence, still

it was an element in the case to be taken into consideration in the prisoner's favour, in so far as it helped to interpret the motive, or rather the absence of all motive, for the crime. A drunk man may take away life without any rational motive, and where there is no rational motive there can be no rational or deliberate intention to commit the crime. We confess that we see no reason why such evidence should only be admitted in this indirect form. Temperance is happily so popular at present that it is dangerous to say anything that may seem like a palliation of drunkenness, still we do not understand on what principle the law can refuse to admit the fact of intoxication as in any degree an excuse for crime. One is quite justified in knocking down the man who tries to jostle or lay hold of one on the street, but it were sheer brutality to do so were the man merely a drunken wretch staggering along in the semi-unconsciousness of drink. So in social life. The parent, wife, or friend may be justly indignant at the drunkenness, but no one dreams of treating the actions done or the words said whilst in this state as if they had been done or said in a state of sobriety. The shame and disgrace of the drunkenness is fully recognised, but the drunkenness is the limit of the offence. The lad who out of sheer malice, and to annoy his mother, deliberately smashed the drawing-room ornaments to pieces must be a fiend incarnate; but the lad who, coming in from a late supper, staggered about, knocked over the drawing-room furniture, and in his playful excitement sent a flower-pot flying through the chandelier, was (as has happened, we suppose, once in a way to at least every second son of Noah) drunk!

The law alone refuses to recognise any such distinction. The drunkenness itself goes for nothing; its consequences are what is all-important. Fitzbooby's head sinks on his breast in peaceful unconsciousness as he finishes his second bottle of port, gently and tenderly the butler and the footman support him upstairs to bed, and the law has nothing to say. Rightly enough, it refuses to invade the sanctity of Fitzbooby's home. The same night Pat Flannigan also loses consciousness as the seventh half-gill grows low, but, alas! Pat's food is not so nourishing, his liquor not so pure as Fitzbooby's, and a period of excitement, terrible though unconscious, supervenes. In a wild paroxysm of his frenzy Pat does a deed of horror; next day he awakens to find himself lying in a cell with a warder by his side, and when, amazed, he asks why he is there, he learns that it is "wilful murder."

The state of the law which stamps as deeds of equal heinousness a deliberate assassination and an act of sheer unconsciousness seems to require some explanation or apology, and such has been sometimes offered. We are told that all men are capable of exercising a deliberate judgment when the drinking-bout begins, and that the man who deliberately begins to drink in the knowledge that the result of such drinking may be a supervening state of

unconscious violence, wilfully undertakes the consequence of such drunkenness. Were the question merely one of civil liability, this might be all very well, but we cannot in reason apply such strict criteria in the matter of criminal responsibility. If Jehu drive too rapidly, and thereby run over and kill a child, he may be indicted for a criminal offence, but no one would dream of charging Jehu with the crime of wilful murder. But why not? Ought not Jehu to have argued thus: "If I drive too fast I may knock over some one, and if I knock over some one I may injure him fatally," just in the same way as the law requires Pat Flannigan to argue, "If I get drunk I may become violent, and if I become violent I may kill some one"? To be consistent, indeed, the law should go one step farther. *Delirium tremens* is a direct consequence of drink, yet, singularly enough, a fatal assault committed by one in that state is not a criminal offence. Now, undoubtedly, without having *delirium tremens*, a man may be just as mad through drink as ever was man in the *delirium*. Wherefore, then, the distinction between offences committed in the one state and the other? The only difference, so far as regards moral responsibility, is that when *delirium tremens* is present, the drinking has probably been protracted over a longer period than when the man is simply furious and unconscious through drink.

These remarks are not intended to suggest that unconsciousness through drink should in any case be accepted as a complete excuse for deeds of violence. The degrees of intoxication are too numerous, there is no gauge of consciousness and consequent responsibility sufficiently accurate to render any such policy consistent with the public safety. Besides, no great harm is done if drunkards be dealt with pretty severely. Better that some who are guilty of nothing worse than getting disgracefully drunk should be locked up for some years, than that there should be immunity or appearance of immunity to crimes of fatal violence. What we have said above, however, is perhaps sufficient to show that the change of our practice, by which juries refuse to convict on the capital charge in such cases, is not without a foundation in reason and justice.

Another plea in extenuation, akin to that of drunkenness, is the weak character of the intellect of the accused. That weakness of mind, not amounting to insanity, is an element which may relevantly be taken into consideration in determining whether the crime of a prisoner is murder or culpable homicide, is a doctrine which has been repeatedly laid down by a venerable judge who still adorns the Bench. The doctrine rests upon his sole authority, but it has so frequently and so positively been enunciated, and at such long intervals of time, that until set aside by some decision of higher authority, it must be regarded as the law of the land. There does not seem to be any very serious objection to the doctrine. The State cannot permit men, even of weak and disordered intellect, to commit crimes with impunity, and it has been clearly established even in the case of such men, the fear of punishment has a

powerful deterrent effect. On the other hand, there can be no doubt that to the lesser talent a lesser degree of responsibility is attached, and that the disordered state of the understanding may in some cases be an exciting motive to crime. Popular sentiment will not allow such men to be hanged, and it is better that a punishment of a less terrible character should be meted out to them with some degree of exactitude and certainty, than that any risk should be incurred of their being allowed to escape scot-free. In no class of such cases can this principle be applied with more salutary effect than in the case of mothers of illegitimate children and pregnant women, who whilst suffering from melancholia frequently either make away with former children during their pregnancy or kill their infants at or shortly after birth. In such cases the charge in the indictment is still invariably that of murder or child-murder, but so far as the chance of a conviction goes, the Advocate-Depute might as well charge the poor woman with witchcraft! It has been established by statistics in France that the strict punishment of such offences by mothers exercises a salutary deterrent effect, and diminishes the number of offences of the kind. To us it would seem that whilst in this country the charge is generally laid too high, the case generally ends by the punishment being set too low.

Most of the non-hanging murders in this country are cases of drunken violence or child-murders, but other cases are readily conceivable in which, as the result of alarm, sudden passion, or slight provocation, crimes may be committed which the law still regards as murders, but which, in virtue of either the absence of premeditation, or some other mitigating circumstance, might well be included with homicides resulting from drunken violence, or committed by persons of weak intellect, or women in childbed, in a category of crime less heinous than that of the poisoner or the assassin. In other countries such crimes are "murders in the second degree," and we see no reason why they should not be so termed and so treated here. Lord Deas remarked the other day from the Bench that in this country *culpable homicide* is the equivalent of "murder in the second degree;" but, with deference, this is hardly so. Most of the offences which in other countries are "murders in the second degree" are by the law of this country "wilful murder," whilst many kinds of offences which in this country are classed as culpable homicides—such as death resulting from overdriving, overlaying children, careless shooting, etc.—could not possibly be described as murders even "in the second degree." It would, as we venture to think, be both harsh and unreasonable to include these latter offences in the same class of crimes as those acts of fatal violence which lead just to the very threshold of the scaffold.

A scheme of classification of the degrees of homicide might be adopted somewhat as follows:—

1. "*Wilful murder*," or "*murder in the first degree*." All homicides deliberately planned by a person of sound intellect, or the

prospect or possibility of which has been deliberately faced (as in the case of a burglar who enters a house prepared to shoot down any one who may resist him).

2. "*Murder in the second degree.*" All homicides other than the foregoing, where unjustifiable violence of a character calculated to destroy life has been employed.

3. "*Culpable homicide.*" All cases of death resulting from criminal neglect of duty, or carelessness, or from violence of a character not calculated in ordinary circumstances to destroy life.

Were some such scheme of classification adopted and formally sanctioned by the Legislature, the administration of this branch of the law would be greatly simplified. The evils to which we referred in a previous article upon this subject would in great measure be removed. The responsibility of the judge would be lessened, the duty of the jury rendered much more clear and simple, and there would be far greater assurance that the crime, to whatever class it belonged, would receive the appropriate punishment. No one would have more cause to rejoice in such a change than the Home Secretary. One of the most difficult and painful of his tasks would be removed from his shoulders, viz. the duty of retrying all murderers without seeing the witnesses or hearing counsel, and with power to hang but none to acquit. The responsibility would rest with the jury, on whom, as they have the privilege to acquit, should devolve the duty to condemn.

CREMATION.

THE question whether or not cremation is lawful is one on which, for reasons which very readily suggest themselves, direct authority cannot be found in the common law. It is a question, however, which may very possibly arise for decision in England or in Scotland immediately, unless the idea of cremation, never possessed of much vitality (if we may be allowed the word in such a connection), on our shores at least, should die betimes, and be itself buried in the vast grave of ill-starred innovations. We therefore propose to say a few words, if not directly upon the subject of cremation, at least upon "graves" (excluding worms and epitaphs) and upon the unconscious tenants of the tomb, as these sombre subjects are looked upon by the law, that we may place before the mind of the reader the principles, as we apprehend them, on which the question of the lawfulness of cremation, if it should arise, will fall to be decided. A consideration of sundry cases in which the litigious spirit of the living has followed the dead to the tomb cannot, it is feared, have the effect of enlivening the dearest month of the year; but seeing that it is not long since our Supreme Court brought to

an end a protracted dispute between a mother and a son about the right to erect a headstone over the grave of a dead member of their family, and was occupied for days in a dispute as to the access to a tomb, and that our highest Criminal Court was but the other day occupied with the disposal of a case arising out of a cruel and infamous desecration of the last resting-place of the dead, it is at least hoped that the subject is not ill-timed or in itself uninteresting. One has but to recall the sensational exploits of American body-snatchers within the last few years, and the anxious provision of our own Parliament within the last few years for the orderly and decent burial of the dead, to be satisfied that the subject is or may become of some importance.

"Men have been fantastical," says Sir Thomas Browne in his famous treatise on *Urn-Burial*, "in the singular contrivances of their corporal dissolution, but the soberest nations have rested on two ways, inhumation and burning. That interment is of the elder date, the examples of Abraham and the patriarchs are sufficient to illustrate; but Christians have abhorred the way of obsequies by fire, and though they stilled not to give their bodies to be burned in their lives, detested that mode after death, affecting rather a depositure than an assumption, and conforming themselves to the will of God, which required them to return again not to ashes but unto dust. But burning was not fully disused till Christianity was finally established, which gave the final extinction to these sepulchral bonfires."

The question whether the destruction by fire of the bodies of the dead is legal with us was raised in the recent case of *Williams v. Williams* (20 L. R. Ch. Div. 659). The circumstances of the case were these. A testator directed his executors to deliver his body within three days after his death to his friend Eliza Williams, that she might dispose of it according to directions contained in a private letter to her. To the person to whom he made this singular bequest he bequeathed also a Wedgwood vase. The directions of the private letter were to burn the body, and the vase was intended for the reception of its ashes. The testator directed his executors to repay to Eliza Williams the expenses she might incur in carrying out the private directions given her. He was an advocate for cremation, and she had promised to subject his remains to that process.

After the death of the testator, the executors, notwithstanding a protest by Miss Williams, the nature of which is not clear, in the discharge of their ordinary duty, buried the body with the rites of the Roman Catholic Church (of which the testator was a member), according to the directions of his widow and son. Soon thereafter Miss Williams requested the Home Secretary to grant a licence for the removal of the body for the purpose of carrying out the wishes of the testator "by having it burned in this country or elsewhere." She asked that if any legal impediment

existed to her so treating the body, she might be allowed to remove it to consecrated ground, the grave in which it had been laid by the executors being in unconsecrated ground. The Secretary of State refused permission to remove the body for cremation, but it would rather appear that this refusal did not proceed on the ground that the Secretary of State had been advised that cremation is illegal in itself, but that it was inexpedient that the body should be removed for such a purpose after it had been buried. Miss Williams was allowed, for some reason which it is not very easy to see, to remove the body to consecrated ground in a churchyard in another county from that in which it had been before laid, and she took advantage of her opportunity to remove it to carry it off to Italy, and there to burn it and place the ashes in the Wedgwood vase. The executors and the family of the deceased had meantime heard of the removal of the body from the grave where they had laid it, and they obtained (but too late) a revocation of the licence to remove it. Miss Williams then brought an action against the executors to recover the expense she had incurred in carrying out the intentions of the testator, which action was dismissed by the Court on the ground that the executors had a right to the possession of the body, and had acted according to their duty in burying it, and that the removal of it was therefore illegal, without reference to the purpose for which that removal was carried out.

It had been established long prior to the case of *Williams v. Williams* that the dead body of a human being cannot be or become the property of another. That this is well settled in our law there could be no better proof or illustration than the fact that in the recent trial for the act of body-snatching which caused such consternation throughout the country, no charge of theft was brought against the person accused of the crime. The charge of violating the sepulchre of the dead, and disturbing that which the law holds to be too sacred to be the subject of property, is not only in accordance with the established practice of times in which the crime charged was more common, but with the public sentiment also, which underlies both law and practice. Thus also "it was queried among the advocates," says Fountainhall, "if a dead corpse might in the law and practice of Scotland be arrested and stopt for debt by creditors;" and he goes on to mention an actual case in which the proceeding in question was threatened against the corpse of a countess who had died deeply in debt, "for vivers and other necessaries," to tradespeople, who talked of arresting the body which the "vivers" they supplied had once nourished. "But certainly," he proceeds, "though it be tolerated in Holland and some other places, it is reprobated by us as a most barbarous, inhumane custom. Yea, the law condemns it for irrational. However, this arresting has been attempted as to persons dying in prison, but was never allowed or sustained; only I have heard that a man who dies in prison, it is, *ipso facto*, a discharge of all his debt; this, I think, holds in England, but not with

us." A somewhat similar question was brought to actual decision in England so late as in the year 1841, where a jailer claimed right to exercise as against the executors of a prisoner for debt what might in a very significant sense be described as a right of retention of the dead body of one who had been a prisoner for debt under his charge. He had supplied the dead prisoner with various articles while in life, and now that the

"Lifeless body lay
A worn-out fetter, which the soul
Had broken and thrown away,"

he refused to give up the body to the executors until his bill should be paid. The Court of Queen's Bench, however, thinking that a dead body could not be regarded as property which could be subject to a lien, issued a peremptory mandamus commanding him to deliver the body to the executors "that it might be duly interred" (*Reg. v. Fox*, 2 Q. B. 246). The decision seems naturally to follow from the *dictum* of Lord Coke that the "*cadaver is nullius in bonis*." In America, in like manner, it is decided that there can be no right of property in a dead body, but "there is a duty, and therefore we may say a right" (in the living person on whom the duty falls), to protect a body from violation. It may therefore be regarded as a sort of *quasi*-property (*Pierce v. Swan Point Cemetery Co.*, 14 American Reports, 667).

From the fact that a dead body is not an article of property, it follows necessarily that a man cannot dispose of his body by will. When he dies it has ceased to be his, and it is therefore outside of the category of what he can lawfully bequeath. Thus the Anatomy Act, 2 and 3 Will. IV. c. 75, while it directs that the person having lawful possession of the dead body of one who has to his knowledge directed that his body shall be subjected to dissection, shall deliver the body for this purpose, does so under the condition that any relative of the person deceased shall be entitled to require that the body "be interred" without such examination. And thus also in the case of *Williams*, Mr. Justice Kay had no difficulty in holding that a direction by a deceased person to his executors to hand over his body to a person named, to be disposed of by her as he had directed in a letter to her, was a bad direction, and could not be enforced, without respect to the fact that it appeared that the purpose named in the testator's letter was the purpose of cremation, the legality of which manner of disposal his Lordship did not think it necessary either to affirm or deny.

Who, then, is the person who is in lawful possession of the body of a person deceased, whose right and whose duty it is to dispose of the body? Blackstone, who is followed in this matter by Williams (*Williams on Executors*, 6th ed. p. 906), says that the "executor must bury the deceased in a manner suitable to the estate he leaves behind him." But the executor cannot, it is thought, since the duty must be his in no other capacity than as the person holding the fund out of which the funeral expenses

must be paid, and exercising by that means a trust in which all nearly related to the deceased are interested, insist on doing violence to the feelings of those relatives either as regards the manner or the place of burial. Indeed it would even seem that the will of the deceased himself is entitled to consideration in the discharge of the solemn trust, and that in this sense (notwithstanding the fact that a man cannot bequeath his body by a will) it is true, as declared by the canon law, that a man has a right to direct his place of sepulture. So also he has a "right," if no place be named by him, and no suitable place be provided by the executor, to burial in the churchyard of his parish. And in this sense probably it has been said in an American case that "the right of a person to provide by will for the disposition of his body has been generally recognised" (*Pierce v. Swan Point Cemetery Co.*, *supra*). On the same principle that the due disposal of a body is a trust in which a peculiar duty involving the interests of decency and good feeling is to be exercised, it follows that there is a public interest involved in its due execution. Thus a question having arisen between a hospital in which a person had died in an indigent condition and the parish to which he belonged, as to whether the expense of his burial fell on the former or on the latter, the Court of Queen's Bench held that the duty of carrying to the grave decently covered the body of one who dies in any house without leaving the means to provide for his burial, rests on the occupier of that house, and that the feelings and interests of the living require this and create the duty (*Reg. v. Stewart*, 12 A. & E. 773). Obviously also the right of the State to punish the violation of the sepulchre of the dead is in great part derived from the violation of public decency which the act involves.

The duty thus resting in all cases upon some one, and in most cases upon the executor of the deceased, of decently disposing of his body so as not to offend against the "right" either of the dead man himself, of his kinsfolk, or of the public, the question is whether the person on whom the duty is imposed is entitled to discharge it in a way which, whatever may be said for it theoretically, is at least a very novel one, and one which cannot but cause a certain shock of surprise, and probably also of pain, among a community long accustomed to what is known as "decent burial." The mere novelty of it, indeed, is probably no more conclusive of the question than we have seen that the will of the deceased is, if the method of disposal is itself, having regard to the feelings of surviving relatives and of the public, orderly and decent. Thus one charged with the disposal of a body might insist on burying it in a wicker coffin, or perhaps even on carrying it to the grave decently wrapped in dead-clothes, but with the face exposed, as is done in some countries where burial is practised, and the law would not readily interfere with his discretion. The aim of one who desired the speedy dissolution of the corpse which he was laying with due reverence in

the tomb would be regarded with at least as much consideration as that of another who endeavoured by artificial means to arrest the process of decay, and indeed modern ideas are more in sympathy with the former than the latter. But the advocate of cremation tries not to modify, but to overturn the ancient and universal practice of a community, and it seems to us that while he may succeed in demonstrating that the corpse would be reverently and decently disposed of by the system he would adopt, he may, by the mere shock of the change he recommends, be disentitled in the present state of public opinion to put his scheme in practice. Certainly in the first instance no direct authority in our law seems capable of being brought against him. Burial is in our text-books and reports tacitly assumed to be the only mode of disposal of the body known to our law, and when Blackstone says the executor "must bury" the body, he refers of course only to the obligation which rests upon him to dispose of it in a customary and decent manner. Probably nothing stronger in support of the view that our law is by implication hostile to any other than the ordinary manner of the disposal of a dead body can be said than this, that it has laid the duty upon one class of persons of making provision for the burial of the dead. The landowners of a parish are bound to provide accommodation when it is needed. But it cannot be said that the law enjoins burial as the proper mode of disposal of the dead. It merely recognises the practice, and does what law can do to aid it and ensure that decency and private right shall not be injured in its observance.

It is indeed upon a custom which expresses the universal sentiment of most Christian nations for many generations that the whole argument against cremation must be based. That custom appears to us to rest upon the wish, natural in itself and almost universal in its operation, that the bodies of those who have been known to us in life should, for so long at least as the operations of nature will allow it, be suffered to remain unchanged by death. Men recognise that they must part with them, that they must, in the touching words of the patriarch, "bury their dead out of their sight;" but they recoil for the most part—and it is the public sentiment that is here the only law—from the idea of doing anything to hasten that dissolution which they know to be inevitable. The same idea carried a little further leads them to enclose the remains in the coffin, to lay them in the solemn vault, and even to embalm them with loving care, since few have the strength of mind to feel and say of those they love what Cyrus said of himself, that "he desired to be buried, not encased in gold or silver, or any other substance, since what can be more blessed than to mix at once with that which produceth and nourisheth everything excellent and beneficial to mankind?" The influence also of a faith which teaches that the body, though it perish and return to dust, shall be raised up to new and better life, encouraged men to bury

their dead rather than to destroy them, and taught them to lay them beneath and around the sacred edifice in which they themselves worshipped the God who had promised a resurrection. Around the same custom literature wove many of its tenderest associations, while law accepted it as fitting, and sought merely to regulate and maintain it. Lord Stowell, in one of the most graceful and eloquent of his judgments, in which, as preliminary to the decision of a question relating to a particular mode of burial, he discusses and comments upon the custom of burial itself, has this passage: "The authority under which the received practices exist is to be found in our manners rather than in our laws; they have their origin in natural sentiments of public decency and private affection; they are ratified by common usage and consent; and being attached to a subject of the gravest and most impressive nature, remain unaltered by private caprice and fancy amid all the giddy revolutions that are perpetually varying the modes and fashions that belong to the lighter circumstances of human life" (*Gilbert v. Buzzard*, 2 Haggard, Consistorial Reports, p. 333).

When we consider, then, the public sentiment on which the custom of burial is based, how strong, how tender, and how ancient are the associations by which the custom is surrounded, it becomes apparent that a mere demonstration of the fact, which an opponent of the legality of cremation might admit, that in disposal of the body of the dead by fire, done by reverent or it may be by loving hands, there is, or need be, nothing of disrespect and no invasion of public decency, is insufficient as a solution of the question. It might be shown that a person deceased had desired and directed that his body should be destroyed by fire, that his nearest relative or executor was anxious to fulfil his wishes, and was willing to see that they were carried out in seclusion and with reverent hands. The law seems to us to be that such an invasion of the custom sanctioned by ages of practice, and subject only to one, and that a statutory exception for a laudable practice, would not be permitted. Indeed the exception to which we refer, the keeping back of bodies from ordinary and decent burial for the useful and laudable purpose of the anatomist, is only permitted subject to the direct requirement that the bodies subjected to the knife of the anatomist "shall, after undergoing anatomical examination, be decently interred." The task of those who desire—as the testator in the case of *Williams v. Williams*, which has suggested these remarks, did—to institute and to spread the practice of cremation must first be to bring, not a few minds, but the public mind, to the conviction that the practice of cremation is as decent and as reverent, and more healthful than the practice of burial; that while it may be in conflict with the practice of ages, it is not inconsistent with the tender and respectful emotions with which we regard the dead.

Lord Loughborough, in opposing the proposal, happily long since carried into effect, that the bodies of men executed for murder should

be buried in prison rather than delivered to the anatomist for dissection, once said that he had often observed a hardened criminal hear with indifference the sentence that doomed him to die, but shudder with horror when told that his body must then be given up to the anatomist's knife. That no kindred horror would be added to the dread of death for themselves and their friends in the mind of the great body of the people of this country, if the practice of cremation were to become general, must, it would seem to us, be clearly established before the will of a few men of hardy minds can be allowed to innovate upon the practice of the race. Sanitary consideration may call out for cremation, and may yet induce the Legislature to make the practice compulsory. But until that is done, or at least until the feelings which have in the minds of the mass of men enshrined themselves inextricably with the idea of burial have been shown to be altered in favour of a practice utterly different, it will be, in our view, illegal in this country to dispose of a dead body by fire.

While these pages were passing through the press, indeed, an incident occurred which illustrates our belief that the public mind is still far from the conviction which alone would justify or legalize the practice of cremation. There appeared in the *Times* an account of the successful cremation of the bodies of two ladies who died several years ago, and who had, it appears, desired their bodies to be burned. The writer of the description narrated that the bodies had lain in a vault in a private mausoleum for many months, and had then been placed, enclosed in the coffins in which they had so lain, over a fire and burned. He was himself a relative of both the deceased, and he stated that the process was witnessed with approval by the sanitary authorities of the district. The bodies having been burned, the ashes were collected. Public decency does not appear to have been offended by the way in which the thing was done, and those who accomplished the act of cremation were much pleased with the result, and published the account of it to which we refer with the avowed intention of influencing the public mind in favour of cremation. Scarcely had they done so when there appeared a bitter complaint from other relatives of the deceased ladies, who, as is evident, suffered the keenest grief and indignation at the act which had been done. The conflict was certainly unseemly, but the complaint was most natural.

HEWLETT ON SCOTTISH DIGNITIES.

THE Scottish peerage and Scottish peerage law have lately been attracting more than their wonted attention both with us and in the sister country. A gradually increasing and long pent-up

dissatisfaction on the part of the peers, lawyers, and people of Scotland with the tribunal which adjudicated on rights to Scottish dignities was brought to a climax by the finding of a Committee of Privileges in 1875 that an earldom of Mar till then unheard of, and of whose creation there is no record, had been brought into existence by Queen Mary in 1565; followed by an attempt, by means *ex facie* irregular, to deprive of his vote at Holyrood, and if possible of his status as a peer, the lawful possessor of a dignity the survivance of which from pre-feudal times to the present day is among the most interesting and best established facts of Scottish history—a dignity whose origin, according to Lord Hailes, “is lost in its antiquity,” and which the most learned peerage lawyer of the present century describes as not only the oldest existing Scottish earldom, but the most remarkable in the empire, its holder being “the direct heir-at-law through a long and illustrious ancestry of personages who were Earls of Mar *ab initio*, and never known under another title.”

This growing discontent with the treatment of Scottish peerage questions found vent in a reference of the whole subject to a Select Committee of the House of Lords, with Lord Moncreiff as chairman, who drew up a report, dated 12th June last, containing valuable suggestions, which will probably be made the basis of legislation. The report and the evidence on which that report is founded are printed and accessible. A great deal of that evidence was practical, as, for example, the Lord Clerk Register's assertion (155), in which he is corroborated by other testimony, of the general belief in Scotland that Scottish peerage claims are apt under the present system to be decided by English rather than Scottish law; and the various remedies suggested. Much of the evidence was also historical, showing to the satisfaction of the Committee that the exclusive jurisdiction in dignities in Scotland before the Union was in the Court of Session, a fact about which it seems strange that English Law Lords should ever have entertained a doubt; also that the Act of Union made no legislative change in this matter, that peerage claims were in a few instances entertained by the Court of Session after the Union, and that the subsequent introduction of the English practice of petitioning the Crown, and having the claim investigated by the House of Lords, owes its authority to usage only, not to statute. The Committee's recommendations included various changes in the direction of having questions regarding the right to vote at peers' elections and also peerage claims brought under the cognizance of the Court of Session; and in adverting to the practice before the Union, they say that, though not the express ground of their recommendations, “it does tend in a measure to show that the Court of Session is not an unsuitable tribunal of first instance in judging of such controversies,” adding further, that “they are strongly of opinion that the intimate relation which all such questions have to the history

and records of Scotland before the Union, as well as to ancient Scottish laws regarding land rights and succession, must render the views of the Court of Session of material assistance in arriving at a satisfactory decision."

It seemed as if the labours of this Committee were beginning to bear fruit when a book was announced bearing the title "Notes on Dignities in the Peerage of Scotland which are dormant or which have been forfeited. By W. O. Hewlett, F.S.A." We were prepared to expect that when an English solicitor, who was also an accomplished gentleman and Fellow of the Society of Antiquaries, took up the subject of the Scottish Peerage, he would have approached it from the historical and archaeological side, recognising, in the words of the report just quoted, its "intimate relation to the history and records of Scotland before the Union, as well as to ancient Scottish laws regarding land rights and succession," and that he would have made an attempt to acquaint himself with a portion of the large mass of matter bearing on his subject contained in the Scottish records, and with the researches of Scottish historical scholars and antiquaries. At all events, we expected that he would not be found falling into the exploded error of supposing that there was very little knowable about Scottish peerage law beyond what might be gathered from the resolutions of Committees of Privileges, the speeches of the members of these Committees, and the printed cases in peerage claims.

In these expectations we have been somewhat disappointed. Mr. Hewlett begins with an introduction intended to explain generally the nature and peculiarities of Scottish dignities, which is followed by a detailed account of dignities dormant through non-claim and suspended through attainder. The merits of the body of his work we gladly and willingly recognise. Much matter useful for reference to all who wish to inform themselves about Scottish peerages is concentrated in a shape easy of reference, though, as already hinted, viewed almost exclusively from a Committee of Privileges' point of view. The following passage from the introduction sets forth the sources of information consulted by the author:—

The short accounts which are subjoined of the Scottish dignities which are at present dormant or have been forfeited by attainders for high treason have been prepared from Douglas' Peerage and Baronage of Scotland and other authors on dignities, as well as from the printed cases and minutes of evidence upon claims to peerages of Scotland. The printed cases, owing both to the able researches and valuable experience of those engaged professionally as advisers of the claimants (which has led to the discovery of many public records and of many private muniments which were not previously known) and to the accurate and extensive learning of the counsel engaged on such cases, contain reliable material not only in support of the titles of the respective claimants, but also for establishing the law relating to the descent of, and right of succession to, Scottish peerages generally, and the principles by which the descent of such peerages are governed.

Now Douglas' "Peerage of Scotland," whether the original work of 1764 or Mr. J. P. Wood's remodelled edition of 1812 be meant, handy as it often is for reference, is not a book that can claim a place alongside of such English works as the Baronage of Dugdale or Peerage of Collins. It is admittedly far behind the critical and historical scholarship of its day, far more of the present time; and it therefore hardly deserves to be put in the forefront among works on dignities. But there are works of sterling value and real research on Scottish dignities; and if an English lawyer practising in his own country has not the same access to the Scottish records that we in Edinburgh possess, he has it at least in his power to make himself acquainted with the large amount of printed material from the records and other sources which is to be found in the books alluded to, among which we would give the first place to the elaborate treatise of the greatest Scottish record scholar and peerage lawyer of the present century. Riddell's "Peerage and Consistorial Law" is a work with which Mr. Hewlett seems unacquainted, and to whose existence we have not observed one allusion in his pages. While we agree with Mr. Hewlett that much valuable matter lies hidden in the minutes of evidence in some peerage claims, we are not disposed to estimate quite as highly as he does the legal principles laid down in printed cases. These are to a large extent made up of *ex parte* statements both of law and fact. Though often drawn by Scottish lawyers, they have generally been revised and modified by English counsel, whose aim naturally was to present the argument in the shape that experience had taught them would be most effective with English Law Lords. One famous exception, however, must be admitted to our last remark, namely, Lord Hailes' "Additional Case for the Countess of Sutherland." It was not without reason that Lord Mansfield spoke of "the author of *Lady Elizabeth's* case not pleading as a counsel but delivering his opinion as a judge." Lord Hailes, by a long way the most learned historical lawyer of his time, had a peculiarity which, if it was sometimes a disadvantage to him at the Bar, adds greatly to the value of his writings. He not only would never plead a cause of whose justice he was unconvinced, but would never even strengthen his case by an argument of whose soundness he had a doubt. His *Sutherland* case, instead of being, like printed cases generally, a pleading in favour of his client, is a learned and almost exhaustive judicial exposition of the principles involved, including one principle which a more prudent but less conscientious advocate would have kept in the background.¹ Yet

¹ There was a weak, or we should rather say a narrow, point in the Countess of Sutherland's position, connected with the long continuance of the territorial character of earldoms in Scotland. Until about the end of the sixteenth century the regrant of a *comitatus* on a resignation in favour of a new class of heirs altered the investiture of the honours equally with those of the lands; but this close connection was becoming loosened, and our ideas and practice becoming assimilated to the English, about the time when patents of peerage were

we see no evidence that this legal treatise of Lord Hailes, though praised by Lord Mansfield and highly esteemed by all Scottish lawyers, has been studied to much purpose by Mr. Hewlett.

We are surprised also to find that decisions of the Court of Session before the Union, whose importance in peerage questions was so strongly urged by the recent Select Committee, are so rarely mentioned, and when alluded to at all, are dismissed with a doubt as to the competency of the tribunal, or an assumption that they are of no account when put alongside of a resolution of the House of Lords, or even a dictum of an English Law Lord. Thus on p. 78 these words occur: "The claim came before the Court of Session, which was then supposed to have jurisdiction in matters connected with the descent of dignities, there having been no separate House of Peers in Scotland." And on p. 84: "Lord Mansfield in the *Cassillis* case in 1762, and in the *Sutherland* case in 1771, declared the decision of the Court of Session contrary to law and justice, and it has been disregarded in all cases which have come before the House of Lords in which similar questions were raised."

Passages like these necessarily raise the question, Which is of higher authority, a solemn decision of a competent Court prior to the Union, in harmony with all previous precedents and Scottish authorities, or the opinion of an English Legal Lord acting not judicially, but as adviser to the Sovereign under a reference? In the first place, it is undeniable that opinions expressed in Committees of Privileges cannot have the force of resolutions; and the House of Lords has on various occasions declined to import them into resolutions to widen their significance. In the second place, resolutions themselves cannot claim anything approaching the weight of judgments of a court of law, *e.g.* decisions of the House of Lords sitting as a Court of Appeal, with which they have sometimes been loosely confounded. Their character was accurately defined by Lord Chelmsford when, in advising the claim to the earldom of Wiltes in 1869, he said, "A resolution of a Committee of Privileges is in no sense a judgment; and though admitted to be *prima facie* valid and conclusive, yet it does not establish a precedent which all future Committees are bound to follow. The resolutions of Committees of Privileges are merely for the purpose

introduced. In charters near the turning-point it is sometimes difficult to say whether the lands alone or the title in addition are reconveyed to the new heirs. Now it was just about this turning-point, namely, in 1601, that John twelfth Earl of Sutherland got, on his resignation, a charter in which the investiture of his lands was to heirs-male. Had his daughter's case been prepared by any other counsel than Lord Hailes, as little as possible would have been said about the late survival of territorialism in Scotland, or it would have been tacitly assumed, as the English Law Lords assumed, that the Scottish and English usage were alike in this matter. Yet a large and valuable portion of Lord Hailes' case consists in an exposition and vindication of this very principle of territorialism.

of information and advice to the Crown. The Crown, though it generally acts upon, is not bound by them. It may exercise its own discretion in giving or refusing assent to the resolutions." If, then, not even a resolution of the House of Lords has the force of a judgment of a legal tribunal in an English case, still less can the mere dictum of an English law or lay peer, comparatively unversed in Scottish records and precedents, and deriving his information mainly from the pleadings of counsel, be with any propriety put into competition with a decision of the Court of Session, pronounced by the ablest Scottish lawyers of the time, thoroughly familiar with the subjects argued before them.

The part of Mr. Hewlett's book which we like least is the introduction; and if we now go over a part of it, indicating from time to time what statements in it we consider erroneous, we hope the author will understand that this is not done in a carping or unfriendly spirit.

In the opening of this introduction Mr. Hewlett indicates his opinion that few of the dignities that are "either dormant through non-claim or suspended in consequence of attainder can be really extinct;" and one purpose of his book seems to be to suggest that representatives of many peerages generally assumed to be extinct may be alive and in a position to claim them. If unprepared to go so far in this direction as Mr. Hewlett, we have at least more sympathy with his views than with views on the same subject which have been thrown out from time to time by English Law Lords on Committees of Privileges, to whom Mr. Hewlett for once stands in direct opposition. We allude to repeated expressions of opinion that in consideration of the expense and trouble both to claimants and to the Crown, and for other reasons of policy, claims to Scottish peerages long dormant should be discouraged, and a bar of prescription introduced (by private rule of the House) against them. The principle that Committees of Privileges should have regard to the expediency of not increasing the number of the Peers of Scotland, first started and acted on by Lords Hardwicke and Mansfield in the *Cassillis* case, has since been reiterated again and again, perhaps most emphatically in the *Montrose* claim of 1853, where Lord St. Leonards' words were: "It may well deserve consideration whether it would not be wise to put some limit of time upon a claim to peerage, in order to prevent such enormous expense and such consumption of time as must very often take place in regard to ancient peerages." Our answer, in which we hope and think Mr. Hewlett will concur, is that if courts of justice are bound to decide according to law and not according to expediency, *à fortiori* is the House of Lords under a like obligation when giving advice on a matter where the Sovereign is judge.

On p. 6 occurs the following paragraph:—

All Scottish dignities were in their origin territorial, that is, incident to and dependent on tenure; and they appear to have gone to heirs-general in cases

in which the lands were destined to such heirs. This conclusion is supported by the law as laid down on the claims to the Crown of Scotland, the Crown having been awarded to Baliol, the eldest coheir in 1292; on which occasion the Lords Auditors declared that the principle of non-partition between coheirs, which governed the descent of the Crown, applied also to territorial earldoms.

To much of this passage we assent. To be strictly correct, Mr. Hewlett should have added that King Edward's arbiters on the occasion named further added that "if either of the other sisters has not been provided for in the life of the father, it is proper that the eldest, who takes the inheritance, makes her a payment or assignment." This answer was probably, as suggested by the highest living authority on early Scottish history, Mr. W. F. Skene, a compromise between the Celtic and the feudal law. The earldom of Athole, the instance referred to by the arbiters, was then unfeudalized. But Bruce's doctrine, "that no advantage ought to accrue unto the eldest or unto the issue of her except solely the name of the dignity, and especially of the chief messuage," was certainly the law as to feudalized earldoms, as Mr. Hewlett would have seen, had he taken his account of these earldoms from more critical sources than Douglas' *Peerage*.¹

The first sentence of the paragraph last quoted raises the question, How long did Scottish dignities continue territorial? an important inquiry, to which Committees of Privileges have given widely varying and nearly always misleading answers, and to which Mr. Hewlett accordingly vouchsafes no very direct or consistent reply. Yet it is a matter regarding which Scottish records and charter-chests afford the most complete and ample evidence, which may be easily summarized.

In the first place, the sovereigns of Scotland continued to create dignities purely territorial down to 1600. Mr. Hewlett says (p. 7) that "previously to the accession of James VI. to the throne of England the creation of Peers of Scotland merely by letters patent was rare." To speak with more exactness, until three years before James went to England all dignities were territorial; and no such document as a patent of earldom or any other dignity had ever

¹ "On the death of John Earl of Caithness, the last of this line, in 1231, the title of earl passed with only half of the lands of the earldom to Magnus, a son of the Earl of Angus, while we find the other half of the earldom in the possession of the family of De Moravia, and on the death of the last earl of the Angus line this half was divided, and Malise Earl of Strathorne became Earl of Caithness, possessing, however, one-fourth only of the lands of the earldom. In the same manner, when the earldom of Buchan, which had passed by marriage into the hands of the Norman family of Comyn, was forfeited to the Crown, and the last earl was represented by two coheirs, one-half of the lands of the earldom was given by King Robert Bruce to Sir John de Ross, son of the Earl of Ross, who had married the younger daughter; and the other half, with the title of earl, was afterwards conferred upon Sir Alexander Stuart, second son of King Robert II." (Skene's *Celtic Scotland*, vol. iii. p. 76.) See also paper on the earldom of Caithness, by Mr. Skene, in the "Proceedings of the Society of Antiquaries of Scotland," vol. xii. p. 571.

been granted in Scotland. Letters patent of an older date creating earldoms or other dignities have indeed been theorized on again and again in printed cases, but no one alleges that he has ever seen such a document dated prior to 1600, when, coming events casting their shadows before them, James VI., with the near prospect of being King of England, bestowed in English fashion on Lord Seton a patent of the title of Earl of Winton. Previously to that date, when a new earl was created, this was done by erecting the lands to be granted or regranted him by charter into a *comitatus*. As a rule, this charter made no specific grant of the title of earl: the mention of the dignity is indeed so exceptional that only five instances of it earlier than 1578 can be pointed out, all of them the result of specialties.¹ In 1578 the practice first became common of introducing the title of earl; and between that date and 1600 exactly half the charters of earldom granted—they were ten in all—contain separate mention of it.

Down to 1600 therefore, and in the strictest possible sense down to 1578, Scottish earldoms and other dignities continued territorial. Such is the testimony of Scottish records and charters. Lord Mansfield, however, in the *Sutherland* case lays it down that "after 1214 territorial peerages had ceased." Other Law Lords have fixed the date later, and in a recent case it was asserted that earldoms were so certainly not territorial in 1565—it was so impossible that a regrant of earldom in that year should convey the title of earl—that the use of the title by the grantee raised the legal presumption that it must have been conferred by a separate patent of the dignity of earl, a species of instrument which, as we have seen, was unheard of in Scotland till thirty-five years later.

At the foot of p. 6 we are sorry to see Mr. Hewlett giving currency to what we had thought an exploded error, that peerages were sometimes created in Scotland "by investiture only." Abundant evidence exists in our records about the inaugural ceremony of belting in dignities, which in Scotland, as in England and other countries where it prevailed, always presupposed a written charter or patent. The notion of creation by belting has no doubt once or twice received sanction from dicta of English Law Lords, though in other cases it has been repudiated, both before and since Mr. Riddell's disproof of it. In the *Cassillis* case Lord Marchmont laid it down that "there could be no peer without a writ, the creation in Parliament was all a mistake, and the cincture was merely a symbol;" and Lord Mansfield added, "I incline to be of opinion with the noble Lord who spoke last, that there was no creation of any earl or lord of Parliament without some charter or writing."² Selden

¹ While an earldom necessarily implied the existence of an earl, a barony did not of necessity imply that its holder was a Lord of Parliament, and therefore the last-named dignity was always specified; but it too was territorial, granted as an adjunct of a charter of lands.

² Maidment's Report of *Cassillis* Case, pp. 41, 46.

and Cruise, referring to the English practice, express the same opinion, that latter writer laying it down that in all cases of belting there was also a charter.

The subjects of resignation and powers of nominating heirs are taken up together in the following passage (pp. 7-9):—

Although the letters patent creating dignities generally made destinations of the peerage conferred by them, it was by the law of Scotland competent to the grantee or any of his successors to resign such grant into the hands of the Crown for a new grant, limiting the title in such manner as the grantee with the consent of the sovereign might direct, or to such heirs as he might nominate thereafter. . . . It was, however, necessary to have a valid act of resignation made to the sovereign, the sovereign's acceptance of it, and a regrant by the sovereign, and it was also necessary that the regrant should state and proceed upon the resignation, a title by resignation being really a title by progress, and not a title proceeding from the mere will and gift of the Crown. . . .

The case of the earldom of Stair in 1748 involved the effect of a nomination to honours made under the authority of a valid regrant in 1707, anterior to the Union, when the nomination was made after the Union. It was held that the nomination was invalid, as no alteration in the succession of a peerage of Scotland could be made after the Union; and in consequence there was a separation for a time of the Stair honours from the Stair estates. The Erroll claim . . . was allowed by the House of Lords in 1797, because the act of nomination had been made before the Union. There is, it is believed, no instance of a resignation to extinguish a peerage, save in the case of the earldom of Ross in 1476; and that resignation was a resignation of the territorial earldom of Ross, which carried the dignity with it.

Scottish peers were, as here stated, in the practice of resigning their lands and honours into the King's hands with the view of having them conveyed to a new series of heirs.¹ Against such a transaction the heir under the old investiture had no redress, while the resigner, if he was not certain of the King's favour, ran the risk of the Crown not implementing his wishes. The fee once resigned was in the hands of the King, who might or might not carry out the resigner's intentions. That such was the law was assumed by the Court of Session in 1633 in the very important case of Oliphant; and a contrary doctrine would have involved the entire subversion of the feudal law of Scotland. Yet in the Cassillis claim we find Lord Mansfield alluding to the clear statement on this point in the Oliphant judgment as "manifestly wrong and against common-sense," and declaring that that decision was therefore to be entirely disregarded on another separate matter involved in the case, namely, the presumption at common law that peerages went to heirs-of-line, regarding which we shall have something to say presently.

Before quitting the subject of resignation, we must demur to the earldom of Ross being cited as the only case of resignation to extinguish a peerage. The short-lived earldom of Caithness created in 1452 exhibits a notable example of the same thing. Sir George

¹ The same practice undoubtedly obtained at one time in England also, but was declared illegal in the *Purbeck* case in 1675 (Cruise on Dignities, p. 113).

Crichton of Cairnes had in that year extensive territories in Caithness and elsewhere united in his favour into the earldom of Caithness, and granted to him and his assignees; and he was belted Earl of Caithness in the Parliament of June 1452. Though he had both a son and a daughter, he chose as his assignee King James II., into whose hands he the following year resigned his newly-got earldom, without even reserving his own liferent, a proceeding which the disinherited son vainly endeavoured to oppose, incarcerating his father in Blackness Castle, which was besieged and taken by the King.¹

The seventeenth century usage of investing the grantee in a patent or regrant of peerage with the power of nominating his heirs or successors is not to be confounded with the resignations just spoken of, in which the Crown was a party to the alteration of succession. Deeds of nomination executed under powers conferred, whatever may be said of their expediency, were unquestionably valid, and they required (as was admitted to the fullest extent by the Committee of Privileges in the *Erroll* case) no ratification by the Crown.² But what is to be said of the view which the House of Lords took of this matter in the *Stair* case? A few months before the Union, John second Earl of Stair obtained on a resignation a new patent of his peerage from Queen Anne, with remainder to the heirs-male of his body, whom failing, to such persons descended from the first Viscount Stair (his grandfather) as he should nominate, with other substitutions. Having no issue, he in 1747 executed a nomination in favour of John Dalrymple, eldest son of his brother George, passing over the sons of an intermediate brother William. On his death, which occurred soon afterwards, two rival claimants for the earldom appeared. The plea which Mr. James Dalrymple, who was heir but for the nomination, put forth in his protest at the Peers' election of 1747 was that the Crown had no right to transfer the privilege of nominating to honours to a subject;³ and in his printed case he could only further urge that deeds of nomination required the ratification of the Crown, a plea not only at variance with law, but opposed to the view of Lord Ellenborough, on which the already mentioned *Erroll* case was decided. The House of Lords, however, reported against the nominee and in favour of Mr. James Dalrymple. It certainly requires no small effort of ingenuity to reconcile the *Stair* and

¹ Register of Great Seal, iv. 274, 292; Auchinleck Chronicle, pp. 11, 13; Exchequer Rolls of Scotland, v. pp. 610, 616, 623, 649, 674, and preface, p. cii.

² "The fate of the earldom of Errol and the high hereditary office of Constable at one time hung upon a mere scrap of paper, which contained such a nomination. . . . It was merely its accidental discovery, after a long and intricate search in an obscure quarter, which authorized the decision of the House of Lords, and fixed these high dignities in the noble family of Boyd, who are their present possessors" (Riddell's *Peerage and Consistorial Law*, p. 85).

³ Robertson's *Proceedings relating to the Peerage of Scotland*, p. 251.

Erroll decisions; but Mr. Hewlett attempts to do so by assuming that the House of Lords did not act on the views expressed in *Mr. James Dalrymple's* case, but decided in his favour on the ground that a nomination, to be valid, must be made before the Union. There is, however, not a scrap of evidence that such a plea was thought of at the time of the judgment, which was merely to the effect that the nomination by Earl John was "not valid in law." And, apart from its being an afterthought, a more unsatisfactory *ratio decidendi* could hardly be adduced, inasmuch as there is not a provision of the Act of Union that by any imaginable construction can be interpreted as invalidating the otherwise valid power of nomination conferred by the patent of 1707. In Wallace on Peerages, and *Sir Robert Gordon's* case as claiming the earldom of Sutherland, when the matter was quite recent, the absence of royal ratification was stated to be the ground of the decision; but probably the most correct explanation is that of Sir William Pulteney, the learned editor of Stair's *Institutes*, that the case was adjudged "upon the footing of the English law." After the lapse of twenty-one years the injustice was redressed by the succession of the defeated claimant on the death without issue of his opponent and his opponent's brother.

On p. 9 we have the following paragraph:—

With regard to the descent of Scottish dignities, it appears to be a rule of law, as decided in the cases of *Cassillis* in 1762, *Spynie* in 1785, and *Glencairn* in 1797, that where the origin of the dignity is unknown, the presumption is that it was in its creation limited to the heirs-male of the body of the grantee; but though this is the rule, it was held in the *Sutherland* case in 1771, and in the *Herries* case in 1858, that as it was always in the power of the sovereign to make an honour descendable to females as well as males, this general presumption must give way wherever there are circumstances sufficient to show that heirs-of-line as well as heirs-male were included in the original destination.

This passage, though not very reconcilable with one already quoted from p. 6, is perhaps as successful an attempt as could be made to evolve some principle out of irreconcilable judgments and speeches. But it is by no means a correct enunciation of the law of Scotland on the subject to which it refers.

By the common law of Scotland heritages of all kinds, including alike lands and dignities, go to heirs-of-line.¹ Lord Hailes challenged Sir Robert Gordon's counsel to produce a single exception by way of entail to this general principle prior to the War of Succession, and none such has ever been produced. It was the interest of the Crown to keep the great fiefs from becoming too powerful; and nothing could better conduce to that end than their devolution on several heirs-female, of whom the eldest, with the title and chief messuage, got only a portion of the lands. In the reign of Robert Bruce for the first time a few limitations to heirs-male were granted to favourites of the Crown—Douglases, Lindsays, and Keiths, and the King's nephew and brother; but the general

¹ See this subject discussed, vol. xxv. p. 506 *et seq.*

presumption of law, asserted in Acts of Parliament, acknowledged by the tribunals of the country, and in later times laid down by our institutional writers, was that lands and dignities went to heirs-of-line. The records of our Scottish Parliament show how all our kings who succeeded under age (and that was unhappily the rule and not the exception) on attaining mature years revoked in Parliament all questionable grants made during their minority; and among these were always included settlements on heirs-male to the prejudice of heirs-of-line, which were described on one occasion as "against the law and good conscience," on another as "against the law of God, the law human and of nature."

How then did Committees of Privileges come to assert an opposite doctrine? Partly from the prepossessions of English lawyers for principles and presumptions with which their own law had familiarized them, and partly from considerations of expediency. In the Cassillis claim of 1762, Lord Mansfield, wrongly imagining Sir Thomas Craig to say that lands in Scotland held under a purely military tenure went exclusively to heirs-male, argued that titles must do the same. Misinterpreting some *obiter dicta* of Scottish judges shortly before the Union, he put out of view the whole earlier authority of law and history; and condemning, on grounds which have been already adverted to, the clear statement of law in the *Oliphant* case, he laid down a hard and fast rule, that where no patents can be shown, peerages go to heirs-male of the body. In his speech in a later peerage claim, Lord Mansfield does not disguise that another motive also weighed with him, namely, the desirableness, by putting a bar on the claims of heirs-general, to diminish the number of the Scottish peers, a consideration whose force will be better understood if we keep in view the more or less disguised Jacobite proclivities of the majority of the peers of Scotland at that date.

But ere long the Cassillis dictum and the principle of expediency came into conflict. On the death of William Earl of Sutherland in 1766 it was generally assumed that both estates and honours would be inherited by his only child, an infant daughter. But the original charter of the earldom being unproducible, the Cassillis resolution brought into the field two other competitors, each claiming a separate earldom of Sutherland, to which, in consistency with that resolution, he was undoubtedly entitled. The more formidable claimant was Sir Robert Gordon, to whom, distant as was his relationship to the family, the Cassillis dictum would have given not the dignity only, but the estates entailed by the last earl on the heirs succeeding to the title. In those circumstances Lord Hailes' case (already alluded to), in which it was shown that the earldoms of Buchan, Angus, Athole, Menteith, Carrick, Fife, Ross, Lennox, and Mar had all, and some of them frequently, descended to heirs-female, was welcomed as pointing a way out of the difficulty. But unhappily the Lords on the Committee,

instead of frankly admitting that the Cassillis resolution was wrong, temporized by allowing an exception to it, to the effect that the general presumption in favour of heirs-male of the body (which in 1762 had been declared absolute where no charter limitation to heirs-of-line could be produced) might be rebutted by contradictory evidence produced by the heir-female.

The following passage occurs on pp. 10, 11:—

It was the practice to restore dormant dignities either by charter, letters patent, or royal warrant. In 1629 the dignity of Earl of Athole, created by King James II. before 1457, was, by a charter under the Great Seal, allowed and confirmed to John Murray, afterwards Earl of Tullibardine. In 1631 letters patent were passed which purported to admit the right of William Earl of Menteith to be Earl of Strathern, and to restore him to the dignity of Earl of Strathern granted by King Robert II. to his son Prince David in 1371; but the letters patent were reduced and declared void by the Court of Session in an action of reduction in 1633, on the ground that the retour finding the Earl of Menteith to be heir of the Earl of Strathern was erroneous. This conclusion would appear to have been arrived at on political more than on legal grounds. The dignity of Lord Saltoun was created in 1445 with a destination, according to the statement made in the warrant of 1670, to the grantee and the heirs of his body; on the 11th of July 1670 King Charles II. allowed and confirmed the dignity to Alexander Fraser, the senior heir-of-line, by a royal warrant which was confirmed by Parliament on the 22nd of August then following; and King Charles II. and King William III. by royal warrants authorized the collateral heirs-male of George Home, Earl of Dunbar, to assume and bear the title of Earl of Dunbar.

It is a principle of law that an Act of the Crown cannot be carried beyond its intentment; and these instances show that when the Sovereign meant to restore an ancient honour, and not to create a new dignity, a special instrument declaring the royal pleasure was required; for an Act of the Crown, sufficient according to law to create a new dignity, would not be sufficient to restore an ancient honour, as it would not show any intention to create the peerage as a new dignity. From the time of King Henry III. of England to the present time it has been the practice in England to confer new dignities of the same names as more ancient titles which had failed; and a similar practice prevailed in Scotland from the time of King Robert the Bruce to that of King William III.

There seems to us a little confusion of idea in the foregoing passage. If a dignity was merely dormant, the King had no power to confer it on, or confirm it to, any one but the lawful heir. The right of that heir was cognizable by the legal tribunals of the country alone, before whom even the King himself must appear as a suitor, as James VI. did in 1588, when he unsuccessfully claimed the earldom of Angus. If, again, the dignity had lapsed to the Crown, the King sometimes conferred another title of the same name, as Mr. Hewlett truly says; and the two classes of cases must be carefully distinguished. In the *Strathern* case, which decidedly belongs to the first category, the charter of Charles I. is expressly based on the narrative that the grantee had proved himself by service to be undoubted heir-of-blood to the earldom, to have the "*jus bonum ad prædictum comitatum de Strathern*," which, out of respect to the King, he had resigned into his hands. The *Saltoun* case was not, like the last, a restoration to a dormant

title; but it is an instructive illustration of the legal presumption in favour of heirs-of-line to which we have already had to refer. The original charter creating the dignity had been lost before 1606, as appears from the Note of Productions made at the time of the ranking of the Peers, and its limitation was therefore unknown. Nevertheless, on the death of Alexander Abernethy, Lord Saltoun, in 1669, the title devolved, agreeably to the established presumption of law, on the heir-of-line, Sir Alexander Fraser of Philorth, who was duly served and retoured. It is true that Charles II. confirmed the barony of Saltoun to him in the following year; but his charter and its Parliamentary ratification, instead of setting forth, as Mr. Hewlett avers, that the dignity was created at a particular date, and with a particular destination, merely asserts that he was heir-of-line of Alexander Abernethy, the last Lord Saltoun, referring to his service as proof of the fact.¹ In the case of the earldom of Dunbar, regarding which the information in the body of Mr. Hewlett's work is rather defective, Charles II.'s acknowledgment of Sir Alexander Home as Earl of Dunbar proceeded on a report by Sir Thomas Hope, Lord Advocate and the greatest lawyer of his day, that he was in right to that title (a matter which, had it been the subject of dispute, would have had to be decided by the Court of Session and not the King); and King William did no more than acknowledge the status of the nephew and undoubted heir of this earl, resident, like his uncle, in Holland.²

The earldom of Athole created in 1629 was, on the other hand,

¹ Acts of the Parliaments of Scotland, viii. p. 33. There was then alive a near heir-male, Abercromby of Auchincloich, who, had the Scottish presumption not been in favour of heirs-of-line, would have been in right to the dignity, and whose right no new patent, unless proceeding on his resignation, could have prejudiced.

² The title of Earl of Dunbar was created in 1605 in favour of George Lord Home of Berwick and his heirs-male. He died in 1611, leaving daughters only, to whom his lands went; and his nephew, John Home of Steill, was in 1622 served heir-male to him; but his means being narrow, he seems not to have used the title. In 1634, he having died without male issue, Sir Thomas Hope, as King's Advocate, certified to Charles I. that the dignity had lawfully descended to Sir George Home, cousin-german and heir-male of the first earl, and that failing him it would devolve on his son, Sir Alexander Home, Master of the Household to the Princess Royal of Orange at the Hague. It was on a recital of this report of Sir Thomas Hope that Charles II. in 1651 confirmed the title of Earl of Dunbar to Sir Alexander Home, who nevertheless abstained from using it. Sir Alexander Home, *de jure* Earl of Dunbar, having died in 1675, his nephew and heir-male, Captain Alexander Home, succeeded *jure sanguinis* to his dignity, which he had not the same objection to using. When sent from Holland to England to congratulate William III. on his accession he was therefore naturally acknowledged as Earl of Dunbar; and our Parliamentary records tell us that on 30th August 1703 an order was issued to the Clerk Register to "cause the Earl of Dunbar to be insert in his place according to the Decreet of Ranking" (Acts of the Parliaments of Scotland, xi. 77; Riddell's Remarks on Scottish Peerage Law as connected with the Earldom of Devon, 16; Sinclair on Heirs-male, p. 36).

a "new dignity of the same name" as that conferred by James II. on his brother-uterine, which had lapsed to the Crown as far back as 1595 from the failure of the class of heirs called to the succession (heirs-male of the body).¹

On the topic next adverted to, attainder and its effects, Mr. Hewlett is a more trustworthy guide, and we can safely commend the portion of his book which bears reference to this subject. In consequence of the extension of the English treason law to Scotland in 1709, an English peerage lawyer is naturally more at home in questions which have arisen out of the forfeitures of 1715 and 1745, than in those that involve an historical knowledge of Scottish feudal law.

At the foot of p. 12 it is asserted with truth that honours are not affected by prescription; but we would be disposed to answer the question whether prescription affects the precedency of dignities, not, as Mr. Hewlett does, in the negative, but in the affirmative. Such was assumed to be the law by the Scottish Parliament in 1695; and the question was not only raised, but virtually decided in the *Sutherland and Crawford* precedency case, where there was a separate finding that protests for precedency made in Parliament are legal interruptions of prescription. The practice of protesting in Parliament for higher precedency certainly grew out of the belief that peers who thought themselves aggrieved by the ranking of 1606 would otherwise lose their redress; and it was with the same understanding that the protests which stood on the records of Parliament were transmitted with the Union Roll to the House of Lords in 1708, and that the practice of protesting for precedency at the elections at Holyrood has been continued down to the present day.

On pp. 17 *et seq.* Mr. Hewlett takes up the once mysterious subject of the seven earldoms of Scotland in a passage of which we quote a part:—

The seven original earldoms of Scotland, which were in their origin small principalities, and the other earldoms, which throughout the time in which they existed may be presumed to have been territorial, are not separately noticed in this work, as, if the dignities attached to or derived from such earldoms depended on the tenure of the lands constituting the earldoms, the heirs of the former possessors, not having the lands, could not apparently have a right to the dignities, and such dignities could not be deemed dormant if a title to the lands could not be established. The seven original earldoms of ancient Scotland were—Angus, Athole, Caithness, Fife, Mar, Moray, and Strathern; and the earldoms of Buchan, Menteith and Ross appear to have been originally dignities by tenure, and are said to have been dependent upon the original earldoms of Mar, Strathern, and Moray.

¹ No doubt Charles I. in his patent of 1629, misapprehending the facts, expressed himself bound in honour and conscience to ratify the dignity of Earl of Athole to the grantee as heir-of-line of the half-brother of James II.; but, as Lord Hailes remarks, "the Earl of Tullibardin himself seems to have doubted of the efficacy of this ratification, and therefore he most judiciously obtained a new patent of the honours of Athole."

Now we much fear that neither the above enumeration of the seven earls, nor the exclusively territorial quality ascribed to the more ancient earldoms, is borne out by any competent authority; and it is to be regretted that Mr. Hewlett should not have availed himself of the researches of critical historians and record scholars on the subject. It was under the Anglo-Saxon influences introduced at the marriage of Malcolm and Margaret, which preceded by a short time the proper introduction of feudalism, that the old Mormaers or Great Stewards became transformed into earls. Alexander I.'s foundation charter of the Monastery of Scone, a document quite Anglo-Saxon in character, and dated either 1114 or 1115, contains the earliest known mention of the dignity of an earl in Scotland. It bears to be granted with the assent of two bishops and seven earls, these earls being Beth, Gospatrick son of Dolfin, Mallus, Madoch, Rothri, Gartnach, and Dufagan.¹ Who Beth was is perhaps uncertain, but the other names can be identified with the Earls of Dunbar, Strathern, Athole, Mar, Buchan, and Angus. "Ed comes" and "Constantinus comes" occur in charters of David I.,² of whom the former can be identified as Earl of Fife. The process of feudalizing the earldoms began under David I., and was carried on by his successors Malcolm the Maiden and William. In the course of the twelfth century the seven earls were gradually passing from the position of "comites" of the sovereign to that of feudal lords, holding the lands with which their connection had been judicial as an earldom of the Crown: the creation of six additional earls, namely, Menteith, Garioch, Lennox, Ross, Carrick, and Caithness, formed part of the feudalizing scheme; and though the earls continued down to 1214 to be spoken of as seven in number, the earldoms enumerated were not always the same.

The most ancient earldoms are described by Mr. Hewlett as in an especial sense territorial. Exactly the reverse is the case. Till feudalized, the earldoms of Scotland were distinctly non-territorial and the earls oftener designated (as in the charters alluded to) by their names than their titles. The ancient earldoms, when converted into feudal holdings, were territorial exactly as far as the newer were, and no further. All the Scottish earldoms had become feudalized before the end of the thirteenth century. The territorial earldoms which Mr. Hewlett considers to differ entirely from the other earldoms of Scotland were in reality in precisely the same position with them. In the case of some of them it has been seen how even at an early period the lands became so subdivided that little remained of them but the chief messuage.

We do not propose to go at length into the short account of each of the older earldoms which follows, which, we think, would have been written rather differently had Mr. Hewlett perused with care the result of Mr. W. F. Skene's researches on the same

¹ Chartulary of Scone, p. 3.

² Chartulary of St. Andrews, pp. 116, 117.

subject as given in his "Celtic Scotland." But we cannot forbear noticing one allusion (on p. 18) to a matter quite recent, to which, even from Mr. Hewlett's own point of view, we must take exception. He says, "The House of Lords held in 1875 that the ancient earldom of Mar had ceased to exist long before the accession of Queen Mary in 1542, and decided that the dignity of Earl of Mar held by the Erskine family was created by the Queen about the time of her marriage with Lord Darnley, on the 29th of July 1565."

Now it is true that Lords Chelmsford and Redesdale, in giving their opinions, expressed severally their belief that the old earldom of Mar had come to an end, but on different and utterly discordant grounds, the theory of the one noble Lord making the period of extinction 1434, and of the other 1377. But neither of these views were imported into the resolution of the House, which simply bore, "That the Earl of Kellie has made out his claim to the honour and dignity of Earl of Mar in the peerage of Scotland created in 1565." It is not therefore correct to say that there was any "holding" of the House of Lords as to the extinction of the ancient earldom of Mar. This was admitted by Lord Chancellor Cairns in a debate in that House on a motion of the Duke of Buccleuch on 9th July 1877, when, speaking of this very matter, he said, "We ought to be very careful not to go beyond what the decision actually was;" and the Select Committee in whose appointment this debate resulted distinctly reported that while the creation of 1565 must be upheld, the heir-general may still have a right to the ancient earldom.

In taking leave of Mr. Hewlett, we feel bound to add that if we have said more about the weak than the strong points of his book, this is not because we are insensible to the careful accuracy of much of it. It was indeed our appreciation of its positive merits that suggested to us the desirableness of such a comment as might obviate the (in our opinion) misleading tendency of some of the author's views.

THE CASE OF STAVERT v. STAVERT.

THE case of *Stavert v. Stavert* recently decided by the First Division of the Court of Session forms perhaps the latest chapter in the history of the Scottish law of divorce. It is noteworthy that Scotland is a country to which people have resorted both for the making and the unmaking of marriages. In former days youthful lovers, under all the fascinations of a romantic attachment, and impelled by the fear of angry parents or possibly by the mere charm of the trip, used to cross the Border to plight their troth before the grimy priest of Gretna Green. All that has been put a

stop to now. But if we have not the marrying in haste, we still know something of the repenting at leisure. Scotland offers, or rather offered, attractions (until recent decisions dispelled them) to parties who find that the once so pleasant marriage ties have been converted into fetters from which it is very desirable to get free. Scotland, a land in which marriages are so easily and in so many different ways contracted, has also been favourably known to guilty spouses as one in which these troublesome and nominally lifelong engagements can with comparatively little difficulty be set aside. But its merits in this respect have, it would appear, been greatly exaggerated. Foreigners may be excused for their somewhat hazy notions of Scottish law, and failure to take a sufficiently comprehensive view of all the points raised. Even a Lord Ordinary, as is seen by this case of *Stavert*, has gone wrong and lost himself amidst the mysteries of the doctrine of domicile.

The narrative in *Stavert's* case is not without interest. Seldom does a legal report favour us with the rehearsals, so to speak, which take place before a litigation becomes public. In this case it was necessary to do so owing to the peculiar nature of the question to be tried, viz. the question of Mr. Stavert's intention. The defender, Thomas Stavert, seems to have been as thorough an Englishman as one could well meet with. Born in Manchester, he had lived almost entirely there during a life of some forty years' duration. He belonged to a Manchester firm. His wife was also English; he had married her in Manchester, and for ten years prior to the summer of 1880 they had resided as man and wife in that city. Unfortunately for the domestic happiness of this couple, there appeared on the scene in that year a certain Miss Amy Fisher, to whom Mr. Stavert transferred his affections, and with whom he straightway departed for the Continent. In the spring of 1881 we find him residing in the company of this lady in a furnished house near Blairgowrie. The question of fact which the Court were called upon to decide was, with what intentions he had come to this place? According to the defender's own evidence, when he came to be examined upon the point, he never intended to remain in Scotland beyond six months, the period for which he had taken his furnished house. Now it happened that while there he came across a very legal article in the *Standard* newspaper. He had come to Scotland for the purpose of facilitating the movements of his injured wife, and assisting her in obtaining a dissolution of the marriage. But now he learned for the first time that in doing so he was committing a fraud on the Scottish Courts. This conduct of his seems to have greatly distressed his mind. He rushed to Edinburgh and consulted a law agent there. "I said," he states in his evidence, "he knew the purpose that I had come for, that according to the article in the *Standard* I saw that I was committing a fraud on the Scottish Courts, and that I wished to right myself on that matter." This delicacy of

conscience upon the part of a man who had not scrupled to violate his marriage vows, this fear of deceiving a mere abstraction, such as Scottish law, is positively startling. But the explanation is afforded by the report. It was doubtless this sentence in the *Standard* article which had impressed him most deeply: "By acquiring a domicile a man thereby acquires the right of regulating his affairs by the laws of the country to which he has so attached himself. But if he has left his own country and acquired a domicile elsewhere with the view of defeating the laws of his own country and evading their operation, he thereby puts himself out of Court." All that he had done, assuming the *Standard* to be right, would have been done in vain. The fraud would have been a fraud to no purpose. The whole subject seems to have presented itself in a less pleasing light. His lawyer, Mr. Haddon, had thought it necessary to remind him of the disagreeable consequences of a Scottish divorce when you happen to be the guilty party. Scotland might give him an early divorce—earlier than could be obtained in England—but he must be prepared to sacrifice the half of his means. Another legal gentleman had suggested that a Scottish divorce might not be valid in England, so that in the end the one country might strip him of half his means, and the other convict him as a bigamist—a pleasing prospect certainly. His Scottish adviser had indeed given assurance that a divorce obtained here would be good over the whole world, but after he was furnished with the opinion of two learned advocates, his confidence in his own knowledge of the law seems to have been somewhat shaken. Poor Mr. Haddon! he had not only to advise the husband, but also to carry on a correspondence with the wife, who had come to Scotland, and guide her until he saw her safely into other legal hands. The advice which he seems to have finally given Mr. Stavert was to this effect, that while a decree of divorce might easily be obtained, no one having any real interest to raise the question of jurisdiction but himself, still, as the future effect of the decree when obtained with regard to a subsequent marriage was so doubtful, he might consider it dangerous to run the risk. Mr. Stavert did consider it dangerous, and in the witness-box he gave what was doubtless the true explanation of his visit to Scotland, and one which, if accepted, must at once dispose of the question of jurisdiction in his favour, and thus put an end to the Scottish proceedings. But of course his statement then made was not in itself sufficient to settle the matter. By that time, whatever had been his original position, he had taken up one hostile to his wife's proceedings. The action, in fact, was a defended one. His statement had accordingly to be tested by his conduct previous to the raising of these legal proceedings. It was by doing so that the Lord President arrived at the conclusion that the action could not be maintained. "It appears to me," his Lordship says, "that all the facts and circumstances go to support the truth of what is said

in his deposition. I am satisfied from the evidence in the case, independently of this statement, that he never intended to remain in Scotland, but that, on the contrary, he was under the impression, erroneously taken up no doubt, but still held *in bona fide*, that if he came and lived in Scotland while the divorce was proceeding, and went away thereafter and never returned, that a good jurisdiction was thereby founded." The opinion of the Lord President was that also of the other judges in the Inner House, and they arrived at it without any difficulty. Indeed the defender's letters seem to render it clear that their writer only contemplated such a residence as would afford him the release he sought, and that no resolution to make even this residence had ever been taken. The matter was merely in contemplation, and when the Scottish divorce came to be viewed as a doubtful blessing, any special desire to reside in Scotland ceased. The Lord Ordinary, however, was prepared to sustain the jurisdiction of the Court, and in doing so he repudiates the idea of its being possible to make a domicile in Scotland by agreement for purposes of divorce. It is not from any such view that he decided the point against the defender. But his view of domicile seems to be this, that it may be acquired by residence, although the party has very vague intentions about remaining. The connection with the country may be feeble, as he admits was Mr. Stavert's with Scotland. If a man is off with the old country, according to Lord Lee's view, it is not necessary that he should be actually on with the new in order to give him a domicile in it. Although Mr. Stavert had but a slender tie with Scotland in the shape of his lease for six months, he had none now with Manchester; for he had sold his house there, and the Scottish abode was his only home. This opinion of Lord Lee derives some support from the case of *Carswell*, decided last year. But it will be observed that there the party whose movements had given rise to the legal question stated not only that it was his intention to reside in Scotland as his home, but that he had abandoned his former country. Mr. Carswell, like Mr. Stavert, seems to have been attracted to Scotland by the charms of its Consistorial Courts, but, unlike Mr. Stavert, he had a clear idea of what to do when he got *there*.

The case of *Stavert* is perhaps chiefly important because of the remarks made upon certain points by the judges in disposing of it. Thus the Lord President touches upon the question "whether the domicile necessary to found jurisdiction in consistorial cases is the same as that which would regulate the intestate succession of the husband," and declines to give an opinion, as it is a matter still unsettled in the Court of last resort. Although there is no formal expression of his views, one would infer from what he does say that he would answer the question in the negative. Lord Shand, on the other hand, is unfavourable to this distinguishing of domiciles, and argues that "where there is a domicile such as will regu-

late succession, we know what we are appealing to, and though there may be great difficulty as to the facts, there is none as to the principles to be applied. In the case of what has been called a 'matrimonial' domicile, however, I should have great difficulty in knowing what standard to look to." According to Lord Deas, who takes the same view as Lord Shand, this point has really been settled by the House of Lords in the case of *Pitt v. Pitt*. Another question raised was whether, if the *locus delicti* is Scotland, and there has been personal citation here, this combination creates a jurisdiction? There are old authorities which teach that it does, and which are described by the Lord President as "a little embarrassing;" for, as he says, "the later decisions, while not expressly repudiating the doctrine, do very clearly by implication determine that that is not a good ground of jurisdiction." As Lord Shand justly says, "In sustaining the jurisdiction of the Courts of this country, it is clearly desirable that we should proceed only on principles which would command the assent of the Courts of other countries, else results might arise most disastrous to the parties."

CIVIL PROCEDURE IN FRANCE.

CONSIDERING the many points of likeness between the Courts of Scotland and those of France, accounted for by the old ties between the kingdoms, which drew them especially close at the period of the institution of the Court of Session, the following extracts from some articles which are appearing in the *Law Times* on Civil Procedure in France should be especially interesting to Scottish lawyers:—

So many European and other states¹ have virtually adopted the French Code de Procédure Civile, that a knowledge of its contents is of the greatest practical and educational value. Yet the code is not as well known as might be expected. This may be partly accounted for by the fact that, contrary to general supposition, the French codes are not easy reading. They are brief in form, and, superficially considered, exceedingly clear and intelligible. But the Englishman who has read through the Code Civil and the Code de Procédure, will have but a very shadowy notion of what the law actually is in France when applied to a real case. The codes have a hopelessly unpractical appearance to the English lawyer, who deals in facts and lets theory take care of itself. They seem to lay down principles so very general in their character,

¹ Italy, many Swiss cantons, Holland, Belgium, Roumania, Mexico, Egypt, etc. Even in other Continental states besides those mentioned, a knowledge of the Code de Procédure will be of infinitely greater service than a corresponding knowledge of English procedure.

that it is difficult to see where their application is to end, or what cases they are destined to meet. Then the reader is struck by a sense of the want of proportion between the different portions of the codes. For instance, twenty-two articles (93-115) of the Code de Procédure are devoted to *délibérés et instructions par écrit*, which are ordered where the Court thinks it expedient either to further consider the case on the report of one of its judges to whom the papers are given; or to have the whole case, including the arguments, put into writing, so that it may examine it more carefully and safely. Many cases are thus treated which here would be referred. But thirty-seven articles are devoted to *faux incidents civils*, which arise where a document used in a trial is asserted to be a forgery by one of the parties. One would expect that of the fifty-nine articles devoted to these two subjects, at least forty-nine would fall to the share of the *délibérés*, etc. Then the arrangement of the Code de Procédure is certainly peculiar. It begins with a description of the jurisdiction of and procedure before the Juge de Paix, a great part of which cannot be rightly understood till the reader reaches livre ii. of the code, which deals with inferior tribunals, which are really only inferior as compared with the Courts of Appeal and of Cassation, being superior to the Court of the Juge de Paix, from the decisions of which they hear appeals. Then, not very far on in the second book, we come to judgments, which are followed by about 300 articles on various, mostly interlocutory, matters which ought logically to come before judgments. In fact it is puzzling to find one's way at all minutely through the codes. Let us remark, too, in passing, that we have scarcely ever come across a French law-book which was provided with an index. Thus the Code de Procédure, like the Code Civil, etc., requires no little explanation and amplification before it can be practically used. We purpose giving in these columns a general view of the consecutive steps in an ordinary action at law before one of the Tribunaux d'Arrondissement or de première instance, as they are sometimes incorrectly termed (for they have both final and appellate jurisdictions). We shall then indicate the nature of the proceedings in the Cours d'Appel and de Cassation, and shall terminate our remarks by a reference to the constitution of and proceedings in the Tribunaux de Commerce. We shall leave out of consideration the Juges de Paix.

The judicial organization of France is very striking to an English mind. There localization is carried out to its fullest extent, the preponderance of the capital being barely more than one would expect from its population. It is true that the Supreme Court of France, the Cour de Cassation, sits there; but, for reasons which we shall hereafter explain, that fact is not of very great real importance. France is divided into eighty-seven departments, which contain altogether 362 arrondissements, a subdivision made for financial, judicial, and administrative purposes. Every arrondissement has

a Tribunal d'Arrondissement or de première instance, except the arrondissements of the department of the Seine, with which Paris is nearly coextensive. This department, which contains three arrondissements, has but one tribunal, called Tribunal de la Seine, which sits at Paris. A few arrondissements, however, have more than one tribunal, the total number of which is 366. Distributed among these 366 are twenty-six Cours d'Appel, and above there is the one Cour de Cassation for the whole of France. Except in the Tribunal de la Seine, the number of judges in a tribunal de première instance is from three to twelve, and three to six supplementary judges. Tribunals having less than seven judges have but one chamber; those having from seven to ten have but two chambers; those having twelve have three chambers. When a tribunal has more than one chamber one must be specially devoted to the *police correctionnelle*, a court answering roughly to our Quarter Sessions. The Tribunal de la Seine has sixty-two judges, eleven vice-presidents, and one president, and ten supplementary judges. It is divided into eleven chambers, of which seven are for civil business, and four for *police correctionnelle*. The quorum for each chamber of Tribunal d'Arrondissement or of the Seine is three, the maximum number of judges being six. The Cour d'Appel of Paris has seventy-two judges, or *conseillers*, as the judges of a court of appeal are called. The other Cours d'Appel have from twenty to thirty *conseillers*, and are divided into three or four chambers, of which two are civil. The Paris Cour d'Appel has four civil and two criminal chambers. The quorum for a civil chamber is seven judges, for the criminal chambers five. The Cour de Cassation has fifty judges or *conseillers*. It is divided into two civil and one criminal chambers. The quorum for each chamber is sixteen. The total number of French judges of all ranks (including about 2900 Juges de Paix, and the judges of the Tribunaux de Commerce) is about 18,650; while the number of barristers is but *circa* 11,500. We may remind our readers that in France judges are not chosen from among the barristers; the *magistrature*, or bench, is a distinct profession.

In order to give a better idea of the jurisdiction of the Tribunaux d'Arrondissements it will be necessary to specify briefly what are the causes which are dealt with by the Juges de Paix on the one hand and the Tribunaux de Commerce on the other. As a general rule it may be stated that in all cases where the amount sought to be recovered does not exceed 100 francs, the Juge de Paix has final jurisdiction; and where the amount is over 100, but does not exceed 200, he has jurisdiction, subject to appeal to a higher court. But this rule admits of several exceptions. The Juge de Paix has jurisdiction, subject to appeal, where the amount of the claim is between 100 and 1500 in cases between innkeepers, boatmen, passengers, carriers, and travellers; in cases where the amount of, but not the right to, compensation for disturbance by landlord is

in dispute. He has jurisdiction, subject to appeal, where the amount in dispute is over 100 francs, and up to any amount in cases between master and servant, or relating to libel and slander (except through the public press as to the former), assaults not cognizable by the criminal law, tenant's repairs, damage to fields and crops by man or beast, the working of factories (where no right to easement is involved), ejection, payment of rent, rescission of leases where the rent of the property affected does not exceed 400 francs, etc.

The Tribunaux de Commerce exercise jurisdiction in all cases arising out of an *acte de commerce* between all parties, traders or not; all matters coming within the scope of the law of bankruptcy, negotiable instruments, auctions, carriers, factors, maritime law, the law of insurance, etc. The professional reader will at once see what an enormous amount of work is handed over to the Tribunaux de Commerce, tribunals exceeding perhaps the ordinary Tribunaux d'Arrondissement in importance, though lacking their dignity in rank. Their decisions are not subject to appeal where the amount in dispute does not exceed 1500 francs. Those cases which do not fall within the jurisdiction of the Tribunaux de Paix or the Tribunaux de Commerce are assigned to the Tribunaux d'Arrondissement. The judgments of the latter are not subject to appeal when the amount claimed does not exceed 1500 francs. To them lie appeals from the Tribunaux de Paix.

The Cours d'Appel take appeals from the Tribunaux d'Arrondissement and de Commerce. When the judicial system of France was first reorganized after the Revolution, a very curious system of appeal prevailed. By a process which is too complicated to be here described, the appellant and the respondent (in French *appellant* and *intimé*) were allowed to appeal from the decision of one Tribunal d'Arrondissement to any other Tribunal d'Arrondissement in the country. They could appeal from the Tribunal of Perpignan to that of Boulogne. It would seem that the reformers were afraid of the effect of establishing courts of appeal which would each control some fourteen Tribunaux d'Arrondissement. They remembered what power the old *parlements* had usurped. But the vices of a system which led to petty warfare between different tribunals of co-ordinate jurisdiction soon led to the institution of regular courts of appeal.

The Cour de Cassation is the supreme court of France; but it is not what it is very commonly asserted to be, namely, the Supreme Court of Appeal, as we understand the term. We shall describe its functions later on when dealing with appeals.

Having given a cursory account of the chief civil courts of France, we pass on to a general view of an action in a Tribunal d'Arrondissement. It is laid down in the French Code de Procédure (art. 48) as a general principle that no principal claim which commences a suit between parties having power to compromise as to the same will be entertained by a tribunal of first

instance, unless the defendant has previously summoned to a conciliation before the Juge de Paix, or unless the parties have voluntarily appeared before him for that purpose. But this principle is subject to a vast number of exceptions which we shall specify presently. At first, conciliation, as the French briefly but somewhat incorrectly call it, was obligatory in all cases even where it must be manifestly fruitless, where great expedition was necessary. But the practical sense of the French soon got the better of their love for an idea, and the principle was cut down in its application, as we shall presently see. Conciliation is dispensed with in the following cases (the reader must bear in mind that in deciding what cases should be exempted from conciliation the Legislature considered what were the probabilities of a compromise being arrived at, and whether the particular parties were entitled to compromise): In all actions affecting the State, public bodies, corporations, infants, lunatics, and curators of vacant successions, actions requiring expedition; against guarantors, or third parties seeking to take part in an action (*intervention*); in all commercial matters; in actions to recover rent or wages, or solicitors' fees, or against two or more parties, even if they have the same interests; in all actions for a separation of property between husband and wife; and in many other cases of minor importance. The exceptions are founded either on the impossibility or the improbability of a compromise, or on the urgency of the suit. It is on this last account that all commercial actions are exempted.

The citation must give at least three days' clear notice, and must contain a summary of the claim. The parties must appear in person, if possible; if not, by proxy. Though the intention of the Legislature seems to be that the parties shall as a rule appear themselves, the Juge de Paix has no power to compel such attendance. At the conciliation meeting the plaintiff can amend and explain his claim, and the defendant can counter-claim. If a compromise is effected, the report of the Juge de Paix must state the terms thereof, and such statement will bind the parties like a private obligation. The party not appearing is fined 10 francs.

The cost of the citation for conciliation is 1 franc 50 cents. When the conciliation is unsuccessful the plaintiff can proceed at once to serve his writ, or *ajournement*, as it is called.

Reviews.

The Elements of Jurisprudence. By T. E. HOLLAND, D.C.L., Chichele Professor of International Law. Second edition. Oxford, at the Clarendon Press. 1882.

CONCERNING the last book of Professor Holland's we felt bound to hint a sense of wonder that it should ever have been issued (*supra*,

p. 156). Concerning the present book the wonder rather is that it should have been reserved for the last quarter of the nineteenth century. Two years ago the English language came into possession for the first time of a readable exposition of the science of Jurisprudence. The want of such a work must have been widely felt, for now we are called on to notice a second edition. The want was not supplied by the speculations of Bentham, which, along with the germs of much of modern legislation, contained elements fitted to perplex or repel the student. Austin's three volumes, and the lectures of which they are an insufficient record, mark the genesis of a rabbinical school of English lawyers, and form the text upon which much recent exercitation has been accumulated. But there is no harder reading in the language than these three volumes, and nothing but the personal influence of the author on his younger contemporaries can account for the position he has taken in the English world of thought. Professor Holland laments to find that Austin is unknown in Germany. The Germans have found him too hard a nut to crack.

The present volume, on the contrary, is pleasant, easy, even alluring reading. It contains nothing that is new except here and there a moderate innovation in nomenclature. But the method is admirable. The self-constraint which pulls the author back when tempted (as every well-furnished scholar constantly is tempted) to stray beyond his immediate topic into ethics or politics, never fails at the right moment. The author very justly disclaims having obtained any material assistance from the German works which profess to treat the same subject; but every page shows how deeply he has drunk at the stream of the Roman Law, as it is still carried on by the Continental civilians. A main cause of the uselessness of Continental speculation to scholars who use the English language is duly pointed out by the author. The single terms "*droit*," "*Recht*," are used in France and Germany to express the two distinct ideas which we know as "law" and "right;" and although the ambiguity is fully recognised abroad, and mitigated by the use of the terms objective and subjective, yet the result has been to impress an air of vagueness or disquisition about the law of nature (*Naturrecht*) which makes them of little use to the English student. A curious proof of the incommensurability of English and German legal nomenclature has been recently furnished by Iheving's popular pamphlet "*Der Kampf um's Recht*." In the preface to a recent edition the author enumerates with pardonable vanity the dozen or so of languages into which his lecture had been translated. English was not one of them, and yet a large part of the lecture was taken up with an encomium on our national habit of strenuously objecting to be "done," and his methods were distinctly English. The reason was plain enough as one read on. The pamphlet, which to the German mind was nothing less than a revelation of a new method, would, if done into idiomatic English, have been a bundle

of truisms, which had in the original been obscured by a defective vocabulary. We observe, however, that Professor Holland so far succumbs to the dying fashion as to admit the existence of a "law of nature," which he explains as that portion of morality which supplies the more important and universal rules for the governance of the outward acts of mankind. Like an illustrious sceptic, "we don't believe there's no sich thing." It is on the point of disappearing below the horizon, just as the *Saturnia regna*, and the state of nature which dazzled the first and eighteenth centuries have done.

Professor Holland, rightly as it seems to us, ventures so far to differ from Austin in his classification of the field of law, as to subordinate the division into the law of persons, and the law of things to that of public law and private law. He also hits a blot in the analysis of contracts which is known as Savigny's. It is not the case that the law demands a real unity of will in the contracting parties. It only regards unity in the manifestation of the wills. The whole book is well worth reading, but the first hundred pages may be specially commended to the student of law.

Rambling Recollections of Old Glasgow. By NESTOR. Glasgow : John Tweed.

THOUGH not strictly connected with law, there are many interesting reminiscences in this volume relating to the profession. It is, we believe, an open secret that the author is Dr. Hugh Barclay, the respected Sheriff-Substitute of Perth, and who has been for long an esteemed contributor to the pages of this Journal. The "Recollections" extend back to the end of last century, and not a few curious facts are brought to light which but for this publication would probably have dropped into oblivion. As might be expected many of these relate to legal matters, and it may not be uninteresting to our readers if we draw attention to a few of them as a specimen of what the book is like.

The judges on Circuit, we are told, took up their abode in the Star and Black Bull Inns alternately, and walked in procession therefrom, always on foot, with a guard of infantry, to the Court-House. Our readers may perhaps recollect a very amusing sketch of Lord Pitmilly in such a procession on a wet day, drawn by John Gibson Lockhart, and reproduced in Lord Cockburn's Journal.¹ "In returning at nights," Nestor says, "the cavalcade, attended by torch-bearers, attracted great crowds. On one occasion at the Saltmarket, at the time of what was called the Radical Rebellion, seditious cries were raised by the populace, when Lord Hermand, one of the judges, snatched a torch from the hands of one of the attendants and gave a defiant response. This was the last of the flambeau pageants." The whole proceedings must indeed have been

¹ Journal of Henry Cockburn, vol. i. p. 172.

very curious. The Court-House was behind the old jail at the foot of the High Street, and entered from the Trongate by a stair abutting on the prison. The accommodation for the public was but scanty. "Whenever a person was seen to come from the Court he was surrounded by the motley crowd, with the question, Who is their Lordships now *sitting on?*" In those days, of course, few circuits passed without a sentence of death being pronounced, and before 1826 the verdicts of the jury were always in writing. The envelope containing the verdict was sealed with black wax if the prisoner had been found guilty, with red wax if otherwise; so the culprit and audience thus learned the result before the seal was broken. In the early part of the century the magistrates attended executions wearing white gloves and carrying white peeled rods or wands. The jury always stood during the judge's charge, and it was not until Lord Cockburn's day that this uncomfortable custom was abolished. Some good stories are given of juries: on one occasion a juror left the sheet of paper which had been supplied to him for the purpose of taking notes behind him, and on examination it was found written in large text from top to bottom, with one uniform line, "*John struck James first.*" There is another story of Lord Hermand which we may quote: there had been a riot in the Trongate between some soldiers and citizens; a young officer, in endeavouring to lead his men back to barracks, drew his sword, which was immediately wrested from him by a painter, who was brought up at the bar to be tried for the offence. In charging the jury, Lord Hermand was very angry. "Gentlemen," he bawled, "the sword was given to this officer by his Majesty, and none dared to take it from him but him who gave it. Had it been I that had that sword, and the painter had sought to deprive me of that weapon, I would—I would—I do not know what the consequences might have been." His Lordship at this stage almost lost the power of speech, and his colleague (Lord Justice-Clerk Boyle) brought him a tumbler of water from the closet behind. The man was acquitted and the audience applauded, on which the judge ordered the Court to be cleared, which was done by a party of soldiery with fixed bayonets! In transportation cases their Lordships used to indulge at great length on the rigid nature of the law in the penal colonies. In one of these long addresses a young girl got tired and interrupted his Lordship with the exclamation, "Never mind, my Lord, I'll get a black man there." His Lordship, nowise disconcerted, merely interjected, "Then, deeply sympathizing, as I certainly do, with the black man, I was going on to say, before you interrupted me, that if you are ever again found swerving from the paths of honesty, you will find a severer law in that region than you have found in this."

We have not space to do more than briefly to notice the amusing description of the Sheriff and other Courts, and of the way in which business was conducted therein. One figure, however,

deserves to be alluded to before we conclude. This was a bailie who often astonished the audience in the Police Court by his use or abuse of the English language. All persons whose cases required more attention he ordered to be "*reprimanded*" (remanded) until next day or some further day. It was the same worthy magistrate who occasionally addressed abandoned offenders by solemnly telling them that henceforth they must be careful of their conduct "as the eye of the Almighty and the Glasgow police would be on them." Remembering the formality he had witnessed at a Circuit Court recently held, the same functionary, in sentencing a man to sixty days' imprisonment, put on his cocked hat, and solemnly uncovering his head, implored a blessing on the culprit's soul.

When we add that the author remembers having seen persons standing in the pillory, and that when he was more than a boy four persons were hung at the same time on one gallows, we have said enough to show that his recollections cannot fail to prove of interest to those who care about what are rapidly becoming the antiquities of Scots Law.

Lectures on Conveyancing. By the late ALEXANDER MONTGOMERIE BELL, W.S., Professor of Conveyancing in the University of Edinburgh. Third edition, with Notes on recent Statutes and Decisions. Two vols. Edinburgh: Bell & Bradfute. 1882.

THE appearance of another edition of Bell's *Lectures* within seven years is of itself a sufficient proof that they supply a felt want in the literature of the profession. We noticed the second edition on its publication in 1876 (*Journal of Jurisprudence*, vol. xxi. p. 44), and we can now only repeat the praise which we then accorded to it. The text of the work remains unchanged, but the decisions and statutes are brought down, in the notes, to the present year. Containing as it does information on every department of conveyancing, it cannot fail to be of the highest use to those who may have occasion to consult it.

Obituary.

MR. JOSEPH ANTHONY DIXON.—We are seldom called upon to record in these columns the death of a gentleman of such universal culture as the one whose name stands at the head of this notice. As a practising lawyer in Glasgow, he was known far beyond the community in which he lived and worked, but it was only his personal friends who were acquainted with the extraordinary depth and

extent of his general scholarship. From the columns of the *Glasgow Herald*, to which newspaper he contributed many brilliant papers, we are indebted for some incidents of his life. He was born in Dumbarton on 3rd September 1832, his father being Mr. Anthony Dixon, glass manufacturer. He had a brilliant university career, winning the Latin Blackstone Gold Medal and the first place in the class of logic. Mr. Dixon was universally acknowledged as one of the acutest and ablest pleaders at the local bar, and perhaps the most widely and scientifically learned in the principles of Scottish and Roman law among the Glasgow practitioners. He acted for a short time as Professor of Commercial Law—on which he spoke with especial authority—in the Andersonian, and his lectures were eagerly attended and greatly esteemed. Latterly his wide range of scientific knowledge, especially of chemistry, made him the universal referee in questions of chemical patents; and he was not merely the solicitor, but the fellow-student, and occasionally the joint-discoverer with some of his most eminent clients of processes of great interest in our chemical manufacturing industries. He worked habitually with Professors Dewar, Armstrong, and Thorpe in this country, and one of these gentlemen has stated his belief that Mr. Dixon was as thoroughly conversant with organic chemistry as any man in Scotland. His scientific interests took the widest range, for he was an excellent botanist and a well-informed student of natural history and comparative anatomy. He was an admirable amateur artist, and few professional men had a better knowledge of our English and Scottish literature. In the course of the present year he was elected a Fellow of the Royal Society of Edinburgh. He not only read German and French fluently, but possessed a scientific knowledge of the structure of both of these languages. He gave Lord M'Laren very great assistance in preparing the seventh, which is the standard edition of "Bell's Commentaries on the Law of Scotland," assistance which Lord M'Laren gracefully acknowledged in his preface.

On 19th October Sheriff Guthrie, who knew him well, on taking his seat on the Bench, made the following reference to his lamented death: "I am," he said, "one of those who think that a Court of Justice should not be made a theatre in which men speak of current events or utter rhetorical eulogies. But some events touch so deeply those who have their business here—the connection of some men with the work of the Court is so intimate and so honourable—that there must be exceptions—rare, indeed, and not lightly admitted—even to that most wholesome rule. Since I last sat here we have sustained an irreparable loss by the death of one whose pre-eminent ability had won for him a place and name that were almost unique. I am using no unmeaning or flattering words. I only repeat what many here know from long experience—that

among the lawyers of Scotland, of whatever rank or order, there was no stronger or more incisive intellect, no mind more amply furnished with all the resources of legal learning, none who laboured in the study or the forum with a more consuming and exhaustive zeal in the cause of his clients than Joseph Anthony Dixon. And we cannot forget that while he was equipped by nature and study with such requisites for a successful career, he had other accomplishments rarely possessed even by the most highly-trained jurist. He was known even beyond the territory of Scottish jurisprudence as one who had as complete a mastery of the secrets of chemical science as those adepts who had given their lives to its study. He was thus able to advise many of his clients at once as a lawyer singularly learned in mercantile and patent law and as a scientific expert. And outside the departments to which he had chiefly devoted his attention, there was hardly any sphere of art or literature, of research or speculation, of which he had not more than the ordinary knowledge of a cultivated man. With these gifts and acquirements, with that indefatigable industry without which great success in professional life is rarely attained even by transcendent talent, Mr. Dixon naturally acquired a high place in the legal profession of Glasgow; and I am pleased to think that almost to the last he continued to give his clients the benefit of his personal services in their more important cases in this Court. He was sincere, free and fearless in thought and speech; too high-minded to seek for business by courting men of wealth and influence; perhaps at times even too thorough and exhaustive in his manner of work; even too ardent in his identification of himself with his client. However it was in this respect, his industry, perseverance, and remarkable ability seemed at last to have secured recognition and reward, when, in the maturity of his powers, he is removed from his place. For us lawyers he will not have lived in vain if his life has helped to keep alive in this western capital of Scotland the tradition of thorough and honest work, of wide and genuine learning, of free thought and independent conduct, without which a lawyer may sometimes have great commercial success, but can never really deserve a place in the highest rank of his profession."

We can add from intimate personal knowledge of the man that Mr. Dixon took a keen interest in all the vital speculations and questions of the age. He had formed for himself clear and decided judgments on most of them, and expressed himself freely and fearlessly on all. No man possessed qualities better fitted to consider them, or a greater wealth of material to guide him in doing so. We can only add that he was as gentle and tender-hearted as he was brave, and many a one who could not help himself will long remember his generous and ungrudging assistance. He died at the age of fifty, too early for his fame, leaving a widow, but no family.

The Month.

Sir H. Hawkins on Police Duties.—Mr. C. E. Howard Vincent, the Director of Criminal Investigations, has just published an abridged edition, for the use of the lower ranks, of his "Police Code and Manual of the Criminal Law." For this Mr. Justice Hawkins has written a preface, which we think worthy of being quoted *in extenso* :—

In the few words I purpose addressing to you it is not my intention to define every duty of a police constable, but rather to point out some matters that all who desire to become good officers ought constantly to bear in mind, for by strict attention to them every man may assuredly raise himself to a higher position in the Force, and by neglect of them he is equally sure always to occupy a low one.

First of all let me impress upon you the necessity of absolute obedience to all who are placed in authority over you, and rigid observance of every regulation made for your general conduct. Such obedience and observance I regard as essential to the existence of a Police Force. Obey every order given to you by your superior officer without for a moment questioning the propriety of it. You are not responsible for the order, but for obedience. In yielding obedience let the humblest member of the Force feel that by good conduct and cheerful submission he may himself rise to be placed in authority to give those orders he is now called on to obey. As to the regulations, a single moment's reflection will teach you that when so many men of different classes and habits are enlisted in one service some rules applicable to all are necessary for the purpose of ensuring uniformity in discipline, action, conduct, and appearance, therefore it is that there are regulations exacting sobriety, punctuality, cleanliness, and many other matters to which I need not refer.

The slightest disobedience in one begets a bad example to others, and if this bad example is followed by a few it is calculated to disorganize and bring discredit upon the whole body.

Let me now say something to each of you as to the mode in which your obligations to the public ought to be performed. Depend upon it, to become a good and efficient officer you must, when on duty, allow nothing but your duty to occupy your thoughts. You must studiously avoid all gossiping. You must not lounge about as though your sole object was to amuse yourself and kill the hours during which the public has a right to your best services, and during which constant vigilance and attention to what is passing around you is expected from you. It is this gossiping, lounging habit which sometimes gives rise to the observation that a policeman is never to be found when he is most wanted. Moreover, a man who gives way to such a habit never observes with so much accuracy that which occurs before his eyes as he who makes it his endeavour to fix his attention upon all that is passing about him. This is a habit not difficult to acquire if you are in earnest, and when once acquired you will find the cultivation of it a source of pleasure, and the hours of duty will be much less irksome. I may add, too, that the man who takes no pains to acquire this habit, for want of attention, generally makes a very bad and inaccurate witness.

I wish you to feel the importance of a steady, constant endeavour by your vigilance to prevent crime as much as possible, and not by your negligence tempt persons to commit it; as you do if you fail in attention to your duty. To my mind the constable who keeps his beat free from crime deserves much more credit than he does who only counts up the number of convictions he has obtained for offences committed within it. It is true the latter makes more show than the former, but the former is the better officer. The great object of the law is to prevent crime; and when many crimes are committed in any particular district one is apt to suspect that there has been something defective in the amount of vigilance exercised over it.

Whatever duty you may be called on to perform, keep a curb on your temper. An angry man is as unfit for duty as a drunken one, and is incapable of calmly exercising that discretion which a constable is so often called on to exercise. Be civil and listen respectfully to everybody who addresses you, and if occasionally you are remonstrated with for the course you are taking, do not hastily jump to the conclusion, as some constables do, that the person who so remonstrates wishes to obstruct you in the execution of your duty.

Beware of being over-zealous or meddlesome. These are dangerous faults. Let your anxiety be to do your duty, but no more. A meddlesome constable, who interferes unnecessarily upon every trifling occasion, stirs up ill-feeling against the Force, and does more harm than good. An over-zealous man, who is always thinking of himself, and desiring to call attention to his own activity, is very likely to fall into a habit of exaggeration, which is a fatal fault, as I shall presently show you.

Much power is vested in a police constable, and many opportunities are given him to be hard and oppressive, especially to those in his custody. Pray avoid hardness and oppression, be firm but not brutal, make only discreet use of your powers. If one person wishes to give another into your custody for felony you are not absolutely bound to arrest. You ought to exercise your discretion, having regard to the nature of the crime, the surrounding circumstances, and the condition and character of the accuser and the accused.

Be very careful to distinguish between cases of illness and drunkenness. Many very serious errors have been committed for want of care in this respect.

Much discussion has on various occasions arisen touching the conduct of the police in listening to and repeating statements of accused persons. I will try, therefore, to point out what I think is the proper course for a constable to take with regard to such statements.

When a crime has been committed, and you are engaged in endeavouring to discover the author of it, there is no objection to your making inquiries of, or putting questions to, any person from whom you think you can obtain useful information. It is your duty to discover the criminal if you can, and to do this you must make such inquiries, and if in the course of them you should chance to interrogate and to receive answers from a man who turns out to be the criminal himself, and who inculcates himself by these answers, they are nevertheless admissible in evidence, and may be used against him.

When, however, a constable has a warrant to arrest, or is about to arrest a person on his own authority, or has a person in custody for a

crime, it is wrong to question such person touching the crime of which he is accused. Neither judge, magistrate, nor juryman can interrogate an accused person, and require him to answer questions tending to criminate himself. Much less, then, ought a constable to do so, whose duty as regards that person is simply to arrest and detain him in safe custody. On arresting a man the constable ought simply to read his warrant, or tell the accused the nature of the charge upon which he is arrested, leaving it to the person so arrested to say anything or nothing as he pleases. For a constable to press any accused person to say anything with reference to the crime of which he is accused is very wrong. It is well also that it should be generally known that if a statement made by an accused person is made under or in consequence of any promise or threat, even though it amounts to an absolute confession, it cannot be used against the person making it. There is, however, no objection to a constable listening to any mere voluntary statement which a prisoner desires to make, and repeating such statement in evidence; nor is there any objection to his repeating in evidence any conversation he may have heard between the prisoner and any other person. But he ought not, by anything he says or does, to invite or encourage an accused person to make any statement, without first cautioning him that he is not bound to say anything tending to criminate himself, and that anything he says may be used against him. Perhaps the best maxim for a constable to bear in mind with respect to an accused person is, "Keep your eyes and your ears open, and your mouth shut." By silent watchfulness you will hear all you ought to hear. Never act unfairly to a prisoner by coaxing him by word or conduct to divulge anything. If you do, you will assuredly be severely handled at the trial, and it is not unlikely your evidence will be disbelieved.

In detailing any conversation with an accused person, be sure to state the whole conversation from the commencement to the end in the very words used; and in narrating facts, state every fact whether you think it material or not, for you are not the judge of its materiality. Tell, in short, everything; as well that which is in favour of an accused as that which is against him, for your desire and anxiety must be to be fair, and assist the innocent, and not convict any man by unfair means, such as by suppressing something which may tell in his favour, even though you feel certain of his guilt. Unfairness is sure to bring discredit upon those who are guilty of it. If an accused in a conversation with you states any circumstances which you have the means of inquiring into, you ought, whether those circumstances are in his favour or against him, to make such inquiry, and the witnesses who can prove or disprove the truth of the statement ought to be taken before the magistrate when the accused is examined; and if an accused person desires to call witnesses the police should assist him to the best of their power.

I cannot too strongly recommend every constable, however good he may fancy his memory to be, to write down word for word every syllable of every conversation in which an accused has taken a part, and of every statement made to him by an accused person, and to have that written memorandum with him at the trial.

The last but most important duty I would enjoin upon you is, on every occasion, "Speak the truth, the whole truth, and nothing but the

truth." Let no considerations, no anxiety to appear of importance in a case, no desire to procure a conviction or an acquittal, no temptation of any sort induce you ever to swerve one hair's-breadth from the truth—the bare, plain, simple truth. Never exaggerate, or in repeating a conversation or statement add a tone or colour to it. Exaggeration is often even more dangerous than direct falsehood, for it is an addition of a false colour to truth; it is something more than the truth, and it is most dangerous, because it is difficult to detect and separate that which is exaggeration from that which is strictly true; and a man who exaggerates is very apt to be led on to say that which he knows to be false. On the other hand, suppress no part of a conversation or statement, nor any tone or action which accompanies it, for everything you suppress is short of the whole truth. Remember always what reliance is of necessity placed in Courts of Justice upon the testimony of policemen, and bear constantly in mind that in many cases the fate of an accused man, which means his life or his liberty, depends upon that testimony, and seriously reflect how fearful a thing it is for a man to be convicted and put to death, or condemned to penal servitude or imprisonment, upon false testimony. Remember, also, when you are giving evidence, that you are not the person appointed to determine the guilt or the innocence of a person on his trial, nor have you any right to express an opinion upon the subject. Your duty is a very simple and easy one, namely, to tell the Court all you know. The responsibility of the verdict, whether it be guilty or not guilty, rests entirely with the jury or the magistrate (if the case is tried in a police court), and they have a right to expect from you everything within your knowledge to enable them to form a just conclusion. It is right I should tell you that wilfully to tell a falsehood, or pervert the truth in a Court of Justice is perjury; and you all know perjury is a crime punishable with seven years' penal servitude, and your own common-sense will tell you that when perjury is committed by an officer of justice he deserves, and ought to receive, a very severe sentence. Resolve, then, on every occasion to tell the plain, unbiassed, unvarnished truth in all things, even though it may for a moment expose you to censure or mortification, or defeat the object or expectations of those by whom you are called as a witness. Depend upon it, such censure or mortification will be as nothing compared with the character you will earn for yourself as a truthful, reliable man, whose word can always be implicitly depended upon, and the very mortification you endure should be a useful warning to you to avoid in the future the error you have candidly confessed.

I could write a great deal more on the subjects I have touched, but then my address to you would be too long for this little work, which is intended for your guide, and wherein you will find your duties upon various occasions more fully defined. I have only endeavoured in a few friendly sentences to point out to you a line of conduct, the steady adoption of which will enable every man in the police service to feel that he is on the highroad to all that he can desire, having regard to the important and very responsible calling he has selected for himself.

June 5, 1882.

H. HAWKINS.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF PERTH.

Sheriffs MACDONALD and BARCLAY.

A. V. B.

Perth, 25th March 1882.—Having heard parties' procurators, and made avizandum with the process, proof, and debate, Finds the promise of marriage not proved; therefore assoilzies the defender from the conclusions of the action: Finds the pursuer liable to the defender in the expenses of process: Allows an account thereof to be given in, and remits the same, when lodged, to the Auditor of Court to tax and report, and decerns. HUGH BARCLAY.

Note.—The Sheriff-Substitute heard a very able and exhaustive discussion on both sides; but it was wholly on the facts of the case, and none on the law, on which he chiefly desired to have heard the solicitors. There is no question but that the facts established that the defender for a long time courted the pursuer with seeming intentions of marriage. The parties are of equal age and station, and were undoubtedly, what is well understood, in the stage of courtship, which an author has said is the happiest phase of human life, when ardent hope reigns supreme in the bosoms of both parties, 'telling many a flattering tale,' but often in many cases unfortunately never realized.

"The parties here were publicly recognised and known as '*lad and lass*.' Had this been an action of affiliation or seduction, unless some very strong rebutting evidence had been adduced, the pursuer must have prevailed in such suit. The defender's attentions were so long continued and so ardent as entitled—and indeed bound—the pursuer's father to have demanded the defender's intentions towards his daughter, and either to have obtained a solemn promise of marriage from the defender, or caused him to cease his visits and attentions. It is very different, however, when the action is one of breach of promise of marriage with £500 damages craved as solatium. The olden and well-recognised maxim is that matrimony must be entirely free. Marriage is undoubtedly by all legalists recognised as a divine institution. Lord Stair, our earliest and most philosophic writer (1681), lays it down that 'marriage is the only society immediately constituted of God,' and that 'marriage itself and the obligations thence arising are *jure divino*, and all its rights and provisions evidently demonstrate that it is not a human but a divine contract' (title 4, sec. 1). All later institutional writers follow in the same line as his Lordship. In modern times, however, marriage seems to have descended into a mere civil contract. The relation is unfortunately now viewed more as a secular contract of partnership, or one as between master and servant, and it is feared in some cases on one side not far from slavery. As the nuptial tie must be of the utmost freedom on both sides, the law entitles either the man or the woman to reile from the most solemn promise made, even in writing, before the bond is effectually consecrated for a lifetime, either for happiness or sorrow. Lord Eldon observes, 'There is nothing that the law does so solemnly require as that the *consent* to marry shall be full, deliberate, and free—neither the effect of force nor fraud' (3 W. sec. 190). Marriage, therefore, cannot be compelled, and it is well that it is so. Much of the existing misery and crime in the world can be traced to ill-assorted and ill-timed marriages. Hence the fearful and deplorable multitude of cases of divorce and separation in the Supreme Court of parties in the higher and middle ranks of life, and the still more hideous and melancholy daily trials for wife-beating and wife-starving in Police Courts in the lower strata of society. In the Jewish law (and that may be said to be divine), and also in the Roman law, there was a *preliminary* contract to the marriage itself being consecrated or consummated. There were *espousals* for a certain period before the *actual nuptials* of the spouses. No

doubt if a *solemn* promise is violated, the party offending must make reparation to the party offended of all proper and actual damage he or she has sustained. A promise of marriage in Scotland followed by a child born without any sacerdotal ceremony or civil contract constitutes actual marriage, and the child is held lawfully born, and the marriage and legitimacy, when necessary, may be declared by decree of the Supreme Court. The promise in that case, however, can only be proved by the writing or oath of the party. No amount of parole evidence would be admitted to establish the promise. In most cases of breach of promise there is abundant written correspondence—often of the most gushing style. In the present case there is none such. All that can be gathered from the evidence is the very usual course of an ordinary and honourable courtship, although it illustrates the adage that ‘the course of true love never does run smooth.’ If the law refuses to compel a party *directly* to enter into marriage, the same result should not be allowed *indirectly* by a heavy award of damages for not doing what the law had declared he or she was free from performing. In the old case of *Graham v. Erskine*, 1685 (reported by Fountainhall), the Court gave the jilted party £80 for ‘loss of money,’ and the miserable sum of £20 for ‘loss of market.’ The reporter remarked that ‘the decision might be equitable, but it was new.’ Our ancient judges seem to have had a very degrading opinion of the fair sex thus to reduce them to the rank of cattle. Nothing was awarded as ‘solatium for injury to feelings’—a loss which no pecuniary award can possibly recompense. The law in the case of *Graham* was soon repudiated in a case in 1715, reported by Bruce. As to ‘loss of market,’ perhaps a trial for breach of promise of marriage is the best advertisement of a lady. She becomes the object of pity, and it has been said that pity often leads to love. It is to be hoped that such may be the happy result in this instance. The pursuer certainly made a favourable appearance in the case. Her candid and direct evidence favourably contrasts much with the defender’s continued *non memini* or ‘do not remember’ recent events of no small importance. Another case of the kind occurred on 21st December 1770 (*Johnstone v. Paisley*, Mor. 13,106). In that case the judges ‘were clear that no action could be sustained in this country for the breach of a simple promise of marriage unless something had intervened, such as bespeaking clothes, etc., in expectation of marriage.’ In that case the man was of the ‘mature age of seventy-five, and his inamorata only twenty-five, and of a ‘good family.’ The promise was made and admitted; but the septuagenarian resiled, as the match did not meet the approbation of his family, and no wonder that it, was so. The leading case under this head is that of *Mary Hogg v. Nathaniel Gow* (May 27, 1812, Faculty Collection). The facts are very briefly stated in the report, only that the defender ‘having *corresponded* with the pursuer in terms which were held to import a promise of marriage.’ This clearly established that there was *written correspondence* between the parties. Lord Newton, the Lord Ordinary, found the libel relevant, and awarded £500 of damages. On a representation (which was allowed in these days), Lord Woodhouselee, who succeeded Lord Newton, reduced the award to £300. The Inner House (Second Division) on the law of the case affirmed the judgment of the Lords Ordinary, and increased the award to £700. The Sheriff-Substitute would have been much pleased to have perused the Session papers in that case. He thinks he has heard that the lady pursuer was a person of high rank, and the defender a musicseller in Princes Street, Edinburgh, a son of Neil Gow, the celebrated violinist, whose cottage is still shown at Inver, near Dunkeld. The letters of the false one no doubt contained undoubted evidence of a specific promise of marriage. It was said that the majority of the judges (four) were inclined to introduce the English law in this class of cases. Lord Craigie, however, dissented from the judgment in very strong terms, ‘holding the question to be one of damages due or not in the name of *solatium*.’ ‘I am of opinion,’ says his Lordship, ‘that the interlocutor of the Lord Ordinary ought to be altered.’ He states ‘that Lords Belmulo and Hermand had said in a

similar case that no damages were due for a mere breach of promise, and that the law was clearly the other way.' So with the solitary exception of the case of *Graham* in 1685, there is not one case in favour of the pursuer.

"In the present case there is no writing, and the whole evidence amounts to nothing more than that the defender was courting the pursuer, no doubt, with the intention of marriage. But the Sheriff-Substitute is unable to spell out from the massive proof *a direct and specific promise to marry*. There is no special preparations on either side for the marriage. There was no fixed time or period for the consecration, or any house taken for the married pair. It appears to the Sheriff-Substitute that it is irreconcilable with legal principle to hold that a man and woman engaged in an honourable courtship could not discontinue that courtship, or even renege from a promise of marriage, because of some change of circumstances or feelings, and refuse to enter into matrimony with the prospect of unmitigated misery or subject to a heavy penalty for so doing. In many cases the party claiming the privilege of renegeing might justly be the object of public contumely and censure, and the other one of great sympathy. But this is a matter the law can scarcely take cognizance of. In this case the Sheriff-Substitute deeply sympathizes with the pursuer, and deplores the conduct the defender has chosen to follow; but he feels constrained, nevertheless, by the law to find for him and against her, because he can find nothing in the evidence but what is customary between swains of equal age and circumstances. There is certainly nothing in the evidence to show the least taint on the character or conduct of the pursuer to warrant an interruption of the courtship. The girl who, earning by her labour 10s. in the week, could amass £50 had acquired a character for industry and thrift, and was in all likelihood to prove in every way a good wife to any man worthy of her. A host of questions might be put thus: The promise of marriage must be accepted and form a mutual agreement. Now, suppose that it was the pursuer who had renegeed and the defender had prosecuted for damages for a breach of promise of marriage. Such cases have occurred, although the man places himself in no amiable or manly position, since the feelings of the male sex are not so tender and susceptible as those of the softer sex. Suppose, then, that such had been the reverse of the case, there would have been not the slightest evidence that the pursuer had ever consented to become the defender's wife. In fact, if it was the law that courtship itself always inferred a promise of marriage, it would be a mighty barrier to the male sex showing attention to their fair sisterhood. If any of their number should be ingenious and malicious enough (though this is scarcely to be supposed), an ample door would be thus opened to coerce a marriage under the penalty of heavy damages. The matter of attempted compromise has no effect, because (1) all attempts to compromise claims are privileged and rather encouraged; and (2) all that was the subject of compromise was an apology and satisfaction for the injury the defender had undoubtedly done the pursuer by no longer courting her, and without admitting the promise that he was willing to make her some amends for the breaking off of the courtship. The Sheriff-Substitute is not at all moved by the proof of the pursuer not admitting to the gossips of Stanley her intimacy with the defender, and thus proclaiming it on the house-tops of the village. It appears a privilege or perhaps a failing of the sex to deny courtship. They certainly ought not, however, to do so by violating truth. Better to adopt the line of Miss Fiske in this case, and '*decline to answer*' the question. But if they do so, they then would be held as confessing to the soft impeachment.

"It is with great reluctance that the Sheriff-Substitute finds himself constrained to award costs. It is now the universal and judicious rule in all cases where one party has been wholly successful and the other has not. Fortunately, by the recently altered state of the law, the defender cannot restrain the pursuer's liberty; and it would be not only generous, but just and manly, that he at once forego this claim of costs against one who once was his faithful friend, and whom undoubtedly he has deeply injured in her feelings and perhaps in her prospects.

H. B."

Edinburgh, April 29, 1882.—The Sheriff having heard parties' procurators and considered the cause, Recalls the interlocutor of the Sheriff-Substitute: Finds that the pursuer and defender became acquainted several years ago, and that for some years the defender paid great attention to the pursuer: Finds that for at least two years prior to October 1881 the defender courted the pursuer and professed honourable love to her: Finds that on the faith of his professed courtship being honourable he was permitted by the family of the pursuer all the freedom which a respectable family accords to an accepted suitor and to no other: Finds that during the course of the said courtship the defender promised to marry the pursuer, and that the said promise was on various occasions renewed: Finds that on the faith of the said promise, and with the knowledge of the defender, the pursuer made the usual preparations for marriage of a person in her station in life: Finds that the defender has refused to fulfil his said promise: Therefore finds in law that he is liable in reparation to the pursuer, and assesses the damages at £70, for which sum decerns against the defender: Finds him liable in expenses: Allows an account to be lodged, and remits the same, when lodged, to the Auditor to tax and report.

"J. H. A. MACDONALD.

Note.—The Sheriff has no doubt of the honesty of the pursuer and her relations. By the evidence of the relations it is proved that the pursuer and defender were long engaged in courtship, and that they allowed the defender such freedom of intercourse with her as would have been grossly improper in their knowledge and his if matters had been upon any other footing than that he was her recognised and accepted suitor. When the evidence of the pursuer and defender is looked at in the light of these facts, the question of credibility is easily decided. The evidence of the pursuer is entirely consistent with the unquestionable facts; the evidence of the defender is either absolutely at variance with them, or is a not very creditable string of *non mi recordos*. But if the evidence of the pursuer is credible in itself, and is corroborated by the facts, it undoubtedly proves that there was a solemn engagement to marry again and again renewed. This evidence is also corroborated by the evidence of the acts and words of the defender as proved by the pursuer's mother, brother, and sister. The credibility of this evidence is not at all affected by the evidence of witnesses who speak to denials of engagement by the pursuer. Such evidence of casual talk is seldom important in ordinary cases, still less is it so when a young woman is being rallied about her sweetheart. Denials of matrimonial intentions, unless in circumstances which imply very serious statements, are taken in society (to use a popular expression) for 'what they are worth,' and can in a jury question have no weight whatever.

"The defender appears to have relied upon the pursuer having 'no write,' and the Sheriff-Substitute seems to attach importance to there being no letter between the parties; but there was no need, or indeed opportunity, for letter-writing. The parties met freely from day to day, and were continually for hours together in one another's company.

"The Sheriff does not concur in the views expressed by the Sheriff-Substitute as to the law of reparation for breach of promise. Whatever may have been the doubts expressed in earlier cases, it has now long been settled that breach of promise can be proved just as any other fact. The only restriction which subsisted until recently was that neither of the parties could be examined. But a recent statute has abolished this limitation. Accordingly cases for breach of promise are now tried before juries in exactly the same way as cases of assault or slander, so far as the laws of evidence are concerned. Looking at the present case from a jury point of view, the Sheriff has come with no hesitation to the conclusion that the pursuer's is a true case, and is sufficiently proved.

J. H. A. M."

Act.—Mitchell—*Alt.*—Stewart.

An appeal was entered by the defender to the Court of Session, but the case was compromised by the pursuer accepting £10 as damages with expenses of process.

SHERIFF COURT OF LANARK (AIRDRIE).

Sheriff MAIR.

CLELLAND v. MOFFAT.

The circumstances of this case will be gathered from the interlocutor and note.

"Airdrie, 26th September 1882.—Having heard parties' procurators upon the note of pleas for the defenders, before answer, allows to the defenders a proof of the averments contained in said pleas, and to the pursuer a conjunct probation, and continues the cause until 6th October next to fix a diet for taking the proof.

WM. LUDOVIC MAIR.

"Note.—This is an action for payment of £18, 4s. 6d., being the balance, after deducting certain sums paid to account, of £33, 18s. 6d., contained in a bill or promissory note expressed in the following terms: '*Coatbridge, August 5, 1881.*—One day, after date we hereby jointly and severally bind and oblige ourselves to pay to you or your order the sum of £33, 18s. 6d., being cash due to you by the undersigned Wm. Moffat.—(Signed) William Moffat. (Addressed) To Mr. James Clelland, baker, Coatbridge.' On the face of this document the defender Richard Moffat was in the position of a cautioner. In the note of pleas for the defenders, Richard Moffat admits his signature to the document, but alleges that it was obtained by the pursuer having made a charge against his son, the other defender, William Moffat, of embezzlement, and instructed police officers to apprehend him on that charge, and threatened that unless Richard Moffat signed the note as cautioner, his son, William Moffat, would immediately be put into prison, and that all this was done by the pursuer for the purpose of concussing Richard Moffat to sign the note, no statement being exhibited of how the pursuer and the other defender stood as to intromissions, either at the time or since. The defender William Moffat states in his pleas that he signed the note under threat of instant imprisonment, and it is also stated that he was in the pursuer's service as a vanman, and collected accounts for the pursuer. It was maintained for the pursuer that the defences were irrelevant, that the defenders were not entitled to a proof of them, and that the pursuer ought at once to get decree for the sum claimed. I cannot as at present advised assent to this contention of the pursuer. If the statements made for the defenders are true, and in the question of relevancy I must assume their truth, neither of the defenders could be said to be free and voluntary agents at the time the bill or promissory note was taken from them, and, on the contrary, it must have been signed by them under undue pressure exerted by the pursuer. Besides this, the transaction, as stated by the defenders, was, independently of the pressure, an illegal one, and contrary to the settled rules and principles of law. So far as the defender Richard Moffat was concerned, he was in no way responsible to the pursuer for the debts of his son, and the only motive which could induce him to sign the bill and adopt the debt was the hope that by so doing he would relieve his son from criminal responsibility. The question therefore is, whether a father, appealed to under such circumstances, to take upon himself an amount of civil liability, with the knowledge that unless he does so his son will be exposed to a criminal prosecution, can be regarded as a free and voluntary agent. A contract to give security for the debt of another, which is a contract without consideration, is above all things a contract that should be based upon the free and voluntary agency of the individual who enters into it. But the power of considering whether he ought to do so or not is, in my opinion, taken away from a father who is brought into the position of either refusing or leaving his son in a perilous condition, or of taking upon himself the amount of that civil obligation. There is, besides, the other aspect of the case, whether the transaction was an illegal one. At the time the bill was taken from the defenders it is said for them that a charge of embezzlement was made by the pursuer against

William Moffat. Now it has been laid down by the highest legal tribunal of the country (in the case of *Boyley* in 1866) that it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony, and that if you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. That is said to have been the case here. In the case to which I have referred a father appealed to take upon himself a civil liability with the knowledge that unless he did so his son would be exposed to a criminal prosecution, was held not to be a free and voluntary agent, and an agreement made by him under such circumstances was held not to be enforceable. Lord Westbury in delivering his opinion said, 'I regard this as a transaction which must necessarily, for purposes of public utility, be stamped with invalidity, because it is one which undoubtedly in the first place is a departure from what ought to be the principles of fair dealing between man and man, and it is also one which, if such transactions existed to any considerable extent, would be found productive of great injury and mischief to the community. I have used these words as necessary to vindicate the policy and justice of the rule of law, and to show how highly requisite it is that a court of equity should undo a transaction such as this, whether it is regarded as a proceeding from a father, who cannot be considered as a voluntary agent, or, taking the other aspect, as violating the rules of law which prescribe the duties of individuals under such circumstances.' Although the case referred to was an English one, I see no reason for holding that the law there laid down should not apply with equal force to Scotland. If, then, the statements for the defenders are true, and are proved to be so, I will have no alternative, acting on the authority I have quoted, but to assoilzie the defenders from the action as laid upon the bill. This will not bar the pursuer making any claim which he can establish against the defender William Moffat in respect of his defalcations, or otherwise, while he acted as traveller to the pursuer. In pronouncing the above interlocutor, and allowing the defenders a proof of their averments, I have thought it right at this stage to state what I consider to be the law on this subject. If that law is applicable to the circumstances under which the bill was taken from the defenders, it will not certainly be for the pursuer's interest to allow the proof to be proceeded with.

W. L. M."

Act.—Nutt.—Alt.—Rose.

SHERIFF COURT OF FIFE.

Sheriffs CRICHTON and LAMOND.

SOMMERS v. MAGISTRATES OF ST. MONANCE.

Boundary wall—Reparation—Process.—Held,—that an action at the instance of a proprietor whose boundary wall had fallen in consequence, as he alleged, of the operations of the adjoining proprietor on his own ground, to have said adjoining proprietor ordained to rebuild and restore said wall to a secure condition, was a competent mode of procedure, supposing it to be possible that the wall could be restored, and that a claim for damages was not the pursuer's only legal remedy.

George Sommers, carter, St. Monance, raised an action in the Cupar Sheriff Court against the Magistrates and Town Council of St. Monance, praying the Court "to grant a decree ordaining the defenders to rebuild and restore to a secure condition the wall separating the subjects in St. Monance belonging to the pursuer" (which were described) "from the yard belonging to the defenders as Magistrates, etc., of St. Monance, by which yard the subjects belonging to the pursuer are bounded on or towards the south or west, and to ordain the defenders to do all necessary operations for that purpose at the sight of Thomas Currie, architect, Elie, or of such other person as the Court shall think proper; and in the event of the defenders failing or delaying to obtemper such order

within a certain short period, to grant warrant and authority to the pursuer to rebuild and restore, . . . and to decern against the defenders for the amount of the expenses incurred in rebuilding and restoring said wall as the same may be instructed or reported to or determined by the Court in the course of the procedure to follow hereon, and to find the defenders liable in the expenses of this application, and to decern against them therefor. Reserving to the pursuer all right of action competent to him against the defenders and their successors in office for the loss and damage he has sustained or may yet sustain in consequence of their actings after condescended on."

In his condescendence the pursuer averred that in consequence of the defenders having lowered and levelled their yard, part of the ground which formed the natural support of his wall was taken away and said wall was undermined; that the defenders, after their attention was called to the dangerous condition of the wall, commenced to underpin or coalwall it; that in doing so they failed to take the necessary and proper precautions, and that in consequence the middle part of the pursuer's wall fell into the defenders' yard. The St. Monance Town Council in their defences denied that the fall of the wall was in any way attributable to their operations, and averred that it fell in consequence of its defective construction and the position in which it was placed. They further pled that they were entitled to level their ground so as to derive therefrom the use and service of which it was capable, and stated two preliminary pleas—(1) that the application was incompetent, the remedy being not a petition for the restoration of the wall, but an action of damages; and (2) that the application was irrelevant. Sheriff-Substitute Lamond repelled the plea of incompetency, reserving the other pleas so far as preliminary, and allowed a proof. The defenders appealed to Sheriff Crichton, and at the debate before him chiefly relied upon Bell's Prin. sec. 964, in support of their argument that an action of damages was the only remedy open to the pursuer. The pursuer quoted, *inter alia*, Stair, i. 9, 4; Erskine, iii. 1, 14; Guthrie Smith on Reparation, p. 4; *Maxwell v. Glasgow and South-Western Railway Company*, 16th February 1866, 4 Macph. 447; and *McGregor v. Donald*, 24th October 1864 (Sheriff Court of Glasgow), "Scottish Law Magazine and Sheriff Court Reporter," vol. iii. N. S. p. 168. Sheriff Crichton issued the following interlocutor, adhering to his Substitute's judgment:—

"*Edinburgh, 7th September 1882.*—The Sheriff having heard parties' procurators on the appeal for the defenders, and considered the record and whole cause, Dismisses the said appeal: Adheres to the interlocutor of the Sheriff-Substitute of 18th July 1882: Remits to the Sheriff-Substitute to proceed with the cause, and reserves all questions of expenses.

"JAS. ARTHUR CRICHTON.

"*Nota.*—The pursuer is proprietor of certain subjects at St. Monance which are bounded on the south or south-west by the yard belonging to the defenders, and which subjects are separated from the said yard by a wall. The pursuer avers that the defenders by certain operations on their property, which have either been illegally or negligently carried on, have brought down part of this wall. In this action the pursuer asks for a decree to rebuild and restore the wall. There is no alternative conclusion for damages.

"It was urgently pleaded on the part of the defenders that the action is incompetent, the pursuer's only remedy being a claim for damages. The Sheriff has examined the numerous authorities to which he was referred, and he is of opinion that where restoration is possible, it is the appropriate remedy. Mr. Erskine, Book iii. tit. 1, sec. 14, says, 'Where the party injured can be restored precisely to his former state, that method ought to be followed, both as the most natural and the completest reparation.' J. A. C."

Act.—T. & R. J. Davidson.—*Adv.*—W. A. & J. M. Taylor.

THE JOURNAL OF JURISPRUDENCE.

CAPACITY TO MARRY.

(Continued from p. 519.)

III.

FROM an attempt to trace the working of a legal principle through the ever-increasing mass of frequently inconsistent and sometimes irreconcilable decisions, which forms the main part of the unsystematized jurisprudence of Great Britain and the United States, where precedent is everything and codification, even departmental, seems still only a splendid possibility of the distant future, it is refreshing to turn to the more digested systems of Continental Europe, where a code provides for everything and precedent counts for little or nothing, where the law is formulated by the lawgiver in clear and succinct articles, not suggested in verbose and rambling Acts of Parliament, and left to be expiscated and stated by the judge and the jurist. When Justice Cotton said, in *Sottomayor v. De Barros* (L. R. 3 P. D. 5), that it was a well-recognised principle of law that the question of personal capacity to enter into any contract is to be decided by the law of the domicile, he was stating an undeniable proposition with regard to the Continental jurists, both earlier and later, for the two doubtful exceptions usually stated, of Gail and the younger Voet, hardly do more than prove the rule. I shall not attempt a review of the vast field of the earlier jurists, who wrote before the modern process of codification, which has been going on in Europe for nearly a century, and under the influence of the fiction, handed down from the Roman law, of an imperial unity of nations, coextensive with the civilized world. They are to be found largely excerpted from, and amply commented on, in Story, and Fœlix makes a roll-call of them every now and then, at the close of each exposition of a leading doctrine. The question of capacity to marry in the codes of foreign countries and the opinions of foreign jurists falls under the general

doctrine of the ubiquity of personal law as regulative of status and capacity. If there be any divergence of opinion among them as to the extent to which this principle is to be applied in its wider aspects, there is none as to its application to the matrimonial sphere, and to the family relations generally.

The "Allgemeine Landrecht" of Prussia, though eclipsed in fame by her younger French sister, who bears the name of the first Napoleon, is the eldest of the family of European Codes, having been promulgated in 1794. The French Code Civil, whose promulgation was the fruit of Napoleon's leisure after the Peace of Amiens, which closed his first period of conquest, dates from 1803. It was followed in 1812 by the "Oesterreichisches Gesetzbuch," a civil code for the German provinces of the Austrian Empire. Many smaller states, Belgium, Holland, Sardinia (now merged in Italy), several of the lesser German States, and of the Swiss cantons, have subsequently codified their laws more or less after the model of the Code Napoléon; while some others, such as Rhenish Prussia and the Bavarian Palatinate, which were integral parts of the Napoleonic empire when the Code Civil was promulgated, have retained it almost in its entirety. The Italian Code, for the kingdom of United Italy, came into force in 1866, and is the latest born of the family. As the fullest in the department of Private International Law, since it has benefited by the observation of half a century or more of the working of the others, and so contains, as it were, the latest improvements of the trade, Mr. Westlake has taken it as his standard in his comparative chapter on the four. I prefer to take them in historical order.

The general provision of the Prussian Code as to status and capacity is (Einleitung, art. 23), "The personal qualities of a person are to be judged according to the laws of the jurisdiction under which he has his proper domicile."¹ Dr. Koch in his commentary interprets "personal qualities" as "capacity to have rights" (*Rechtsfähigkeit*), and "capacities" as "capacity to act" (*Handlungsfähigkeit*), and herein lies the distinction between the capacity for rights in the abstract and its effects, the various capacities for specific acts or classes of acts, that has given rise to the controversy maintained by two schools of German jurists, represented in chief by Savigny on the one side and Waechter and Bar on the other, which forms the only important divergence among German jurists as to the extent to which the principle

¹ "Die persönlichen Eigenschaften und Befugnisse eines Menschen werden nach den Gesetzen der Gerichtsbarkeit beurtheilt, unter welcher derselbe seinen eigentlichen Wohnsitz hat." This article is somewhat difficult to translate at once neatly and accurately. The above attempt errs rather in verbal redundancy. But to translate "Mensch," "man"—in the sense of *homo*—with Phillimore, or "individual," is to exclude legal persons, such as corporations, who also have a domicile, but who are not individuals. Perhaps the paraphrase of Westlake is, after all, the most practical rendering: "The status and capacity of a person are to be judged according to the law of the jurisdiction in which he is domiciled."

of the *lex domicilii* is to be applied to status and capacity. The controversy, however, does not affect the question of matrimonial capacity. Besides the personal qualities and capacities, proceeds the commentator, the capacity for rights and the capacity to act, there fall to be regulated by the personal statute, that is, the law of the domicile, succession and the family relations, and under the latter head the contract of marriage with its effects, but to the exclusion of the forms by which the contract is solemnized, these being left to the government of the *lex loci contractus*. A Prussian may therefore contract abroad a marriage which will be valid at home, provided Prussian law is satisfied as to his capacity to do so. To this effect the Code itself contains no express enactment affirming the validity of such marriages, but this is involved, first, in the fact that it does not forbid them; and secondly, in the provision that Prussians marrying abroad in evasion of their own law ("um die Gesetze unwirksam zu machen"), besides incurring the invalidity of the marriage, are liable to a pecuniary fine. The Code, however, does make special provision (arts. 143, 144) for the converse, that is, the marriage of a domiciled foreigner there, and consistently carries out its own principle by demanding from the foreigner seeking to marry there the observance of certain forms for its satisfaction as to his capacity by his domestic law, before it will allow the ceremony to be performed by its own officials. The present provisions on this point are contained in the law of 15th March 1854 (Koch, All. L. ii. 60). And it would appear that provision is now actually in force, since 1861, for the case of a Prussian marrying abroad in a state where the law makes inquiry into the domiciliary capacity of foreigners seeking to marry there, by which the party so intending may obtain a certification to that effect from the local judge of his domicile ("von dem Landrathe des Kreises wo er Ortsangehoerig ist," Koch, All. L. ii. 61).

The greatest of German jurists, who may in a sense be called the father of modern Private International Law, Carl Friedrich von Savigny, leaves no doubt as to his adoption of the principle of the domicile as regulating status and capacity to its fullest extent. I quote from Mr. Guthrie's translation (p. 148): "In judging of the various conditions and qualities of a person, whereby the capacity for rights and the capacity to act are determined, a pure and simple application of that local law to which the person himself belongs by his domicile, is the only possible course. This principle, it is true, has not remained uncontradicted. But the number of its supporters is so overwhelming that it may, notwithstanding, be described as an almost universal opinion; it has been confirmed by a universal consuetudinary law in Germany." Coming to the subject of marriage in particular, he says (p. 291), "The conditions of the possibility of marriage, or (viewed from the other side) the impediments to marriage, are founded partly on the personal qualities of each of the two spouses separately, partly on their relation

to one another. According to general principles, it may be supposed that the personal capacity of the wife is to be judged according to the law of her home. But the laws that here come into operation rest on moral considerations, and have a strictly positive nature; and therefore the hindrances to marriage which are recognised in the domicile of the husband are absolutely binding, without respect to the differences which may exist at the home of the wife, or at the place where the marriage is celebrated. This rule holds, in particular, in regard to the forbidden degrees, and the obstacles founded on religious vows." This is rather more definitely expressed from the point of view of the impediments than of the possibilities of marriage. Incapacities at the domicile of the husband override capacities at that of the wife, and impede the marriage. But how as to hindrances existing at the wife's domicile, while none exist at the husband's? Do his capacities abrogate her incapacities and permit the marriage? So much is not expressed, but that so much is meant is inferrible from what is stated, and such is the reading put by Bar on the passage. The *lex domicilii* of the husband is thus, in Savigny's view, the determinant of the matrimonial capacity of both spouses.

He would apparently even carry the principle into what is *prima facie* the sphere of form and not of capacity, by holding that parties by whose domestic law an ecclesiastical ceremony was an essential part of the contract, proposing to marry abroad where only a civil form was required, would fail to make a valid marriage without a subsequent performance of the ecclesiastical ceremony at the place of domicile, which would then operate retrospectively to the effect of validating the marriage *ab initio*. He rests this view on the ground that the prescription of the ecclesiastical ceremony is a law having a basis in religion and morality, and therefore of a coercive nature.

The doctrine that the observance of the forms of the *lex loci contractus* makes a valid marriage has its logical converse in the rule that the use of forms other than those of the *lex loci* would not make a valid marriage. Savigny, however, is of opinion, and claims it as a generally recognised doctrine of Private International Law, that foreign marriages may validly be contracted by observance at the place of contract of the forms of the domicile, ignoring those of the former, that is to say, the observance of the forms of the *lex loci* is merely optional, not imperative. This opinion he supports by the analogy of the international rules which govern testamentary capacity, namely, that the solemnities either of the domicile or of the place of present sojourn may be observed in the efficient making of a will; which is illustrated in Scots law by the case of *Purvis v. Purvis* (23 D. 812), and confirmed by the opinion of the present Lord President in *Valery v. Scott* (3 R. 965).

On the subject of matrimonial capacity Bar is somewhat more definite than Savigny. The family relations in their legal aspects, he thinks, fall under the regulation of the *lex domicilii*, and that

in treating of them regard is to be had only to the consequent particular modification of the general doctrine which he has previously expounded. "The law on this subject is in general, as we have already shown, ruled by the *lex domicilii* of the persons concerned," and therefore it only remained to deduce the consequences of the general rule and follow it in its application to the matrimonial sphere. The *lex loci celebrationis* has, in the matter of capacity, no determining power, except to this extent, that an incapacity merely impeditive ("ein nur impeditrendes Ehehinderniss"), that is, an impediment relative only, which may be got rid of in certain circumstances, such as the consent of parents, as distinguished from one which is absolute, and can never be got rid of, as the subsistence of prior marriage or the forbidden degrees, called by the canonists *impedimentum dirimens*—the former being styled *impedimentum impeditivum*—of the domestic law will, so to say, fly off at the place of celebration, and will not entail invalidity at the place of the domicile. It is, he thinks, an unfortunate combination of this circumstance with the maxim of *locus regit actum*—which has its proper sphere of application only in the forms of marriage—that has led to the erroneous practice of the English and American Courts in adopting the *lex loci contractus* as the criterion of capacity as well as form.

Bar professes to differ from Savigny in regard to the determinant of the capacity of the female spouse: "Some authorities, instead of making the law of the domicile of the husband the exclusive rule, as most do, hold that where the parties concerned have not the same domicile, the particular law of the domicile of each of the spouses must rule his or her case. We cannot meet this contention with the argument that the husband is the head of the family, and that therefore his law must rule, since in such cases we are dealing with circumstances antecedent to the existence of that headship." But though maintaining the accuracy in principle of this rule, he proceeds straightway to qualify it in a manner which humbly appears to me, after much consideration, to involve either a rejection of the principle just posited or to reduce the author to a hopelessly illogical position. "If the marriage," he says, "is prohibited by the law of the wife's domicile, but not by that of the husband, the wife acquires a new domicile, not by the celebration of the marriage, *but from the fact that she follows her husband to his domicile.*" And in a footnote, "If the marriage is not in conflict with the law of the husband's domicile, the wife has a right to acquire one there." The italics are my own.¹

Does the condition precedent not operate here? If the wife acquires a domicile by following *her husband* to his domicile, she cannot do so till she is married to him, and that she can only

¹ In quoting Bar I have used a translation of the "Internationale Privat- und Strafrecht," about to appear immediately, with a view of the proofs of which I have been kindly favoured by the author, Mr. G. R. Gillespie, advocate.

become in disregard of the prohibition at her own domicile. If she can acquire it *before* the marriage, then the question of the condition precedent does not arise; for her personal incapacity has ceased to exist by her change of her own domicile at her own hand, irrespective of the marriage. Let us try it by a concrete instance. A domiciled German wishes to marry his deceased wife's sister, who is a domiciled Englishwoman. Where the marriage is celebrated does not affect the question; nor does the earlier English doctrine of the *lex loci contractus* as the determinant of capacity come in, for in this case English law clearly proceeds on the other principle. Such a marriage is invalid in England *lege domicilii* of the woman. Suppose the question of its validity to be tried in England (as it similarly was in *Brook v. Brook*) in a dispute as to the succession of a child of the marriage to property belonging to the mother of the child in England. Could an English Court, in presence of the *rationes decidendi* enunciated in the House of Lords in that case, do other than hold such child illegitimate by reason of the nullity of its parents' marriage? An English Court did precisely so in principle in the case of *Mette v. Mette*, where the woman was a domiciled foreigner under no incapacity. Could it do otherwise where the woman was the incapacitated party, when the condition precedent of her capacity was fixed by the law of England? She might, of course, if *sui juris* to that effect, before the marriage abandon her own domicile in England, and proceeding to Germany, *animo remanendi*, acquire a domicile, and be married there or elsewhere; but under such a supposition we are no longer dealing with the marriage as a factor in the change of the domicile, we are then dealing simply with the question of a woman's change of domicile as an independent person, which would come to be judged by the recognised criteria of the law of domicile applicable thereto, unaffected by the subsequent occurrence or non-occurrence of the marriage. In short, we find laid down an abstract principle, unquestionably sound, and immediately qualified in its concrete application in a way that leaves it practically no concrete to work in. On the wider question of status in general, though he uses the expressions "domicil" and "*lex domicilii*," the legal concepts expressed by them approach more nearly to the Italian theory of nationality than to the Scottish or English conception of domicile. The precise import of his terms it is not in my way to discuss, since, considered in relation to the theory of capacity founded on the *locus contractus*, either principle operates in the same way.

The enactment of the Code Napoléon as to the operation of the personal statute in general is contained in the 3rd section of article 3: "Les lois concernant l'état et la capacité des personnes régissent les Français, même résidant en pays étranger." This celebrated maxim, though laying down the doctrine with sufficient comprehensiveness, has given rise to much controversy as to the precise meaning of its terms—whether it fixes, as the regulative

factor of the personal statute, political nationality or legal domicile. On this interesting discussion I cannot at present enter. Suffice it to say here that the dispute cannot by any means be said to be as yet finally determined, though the weight of high authority among distinctively French writers—apart from those of other nationalities, Swiss, Belgian, or others, writing in French—apparently leans towards the side of domicile, which was the principle of the old French law. One consideration which appears not to have been sufficiently dwelt upon by the commentators is the historical circumstances under which the Code Civil was framed. The great promulgator whose name it bears was then looking fondly forward to a—in his own mind's eye—not very distant future in which he should be the imperial head of a vast European empire, similar to that of ancient Rome, in which there should be one political nationality, but diverse municipal laws, and in which Frenchmen were to enjoy the privileges of a dominant race, and, like the *cives Romani* in the provinces, to have French law administered to them in the tribunals of the tributary states. This view is supported by the fact that the Code makes no reciprocal provision for the treatment of foreigners in France, which has been silently supplied to French jurisprudence by the practice of her Courts and the writings of her jurists, since she gave up her Napoleonic dream of universal empire. In the mind of Napoleon this imperially-worded enactment thus meant much more than merely that the Frenchman, like the Englishman or the German, should take—to a greater or less extent in either case—his personal law of status and capacity abroad with him: he was to take his own law and procedure with him in its entirety. For the present let us take, as at least Demangeat does in France, and Phillimore in England, the French principle to be that of domicile and not of nationality.

The French law of marriage bristles with stringent and minute provisions, in the way of age, publication of intention—the civil equivalent of proclamation of banns, now paralleled in Scotland by the provisions of the Marriage Notice Act—consent of parents and others, regulating the preliminaries of the contract, more thickly than any other legal system in Christendom. Article 170 provides, “Le mariage contracté en pays étranger entre Français, et entre Français et étrangers, sera valable, s'il a été célébré dans les formes usitées dans le pays, pourvu qu'il ait été précédé des publications prescrites par l'art. 63, au titre des Actes de l'état civil, et que le Français n'ait point contrevenu aux dispositions contenues au chapitre précédent;” that is to say, those relating to the publication (art. 63), and to the various impediments to marriage, which extend to about twenty articles.

It is not, however, the failure to comply with every one of these twenty which would import absolute nullity of a marriage, but only of certain ones enumerated in article 184. These are—the prohibitions which exist to the marriage of a man below eighteen and a

woman below fifteen years of age; those which arise from the subsistence of a previous marriage; or from the forbidden degrees in the direct or collateral lines.

French Courts appear, however, to have begun the administration of these provisions as to publication and *actes respectueux* to French marriages abroad in a way that they could not have been applied to marriages at home, that is to say, to import absolute nullity. A case is cited by Phillimore in the Cour de Cassation in 1837, which was followed by another in a provincial court in the next year, in both of which publications and *actes respectueux* appear to have been omitted, and in which, therefore, the marriages were held void. The judgment of the Cour de Cassation was on the ground that though the law could not, in strictly equitable interpretation, be strained in its application to marriages abroad beyond its legitimate application to marriages at home, yet, as in regard to home marriages, it found its sanction, not in nullity, but in the penalties imposed on the civil officials who were concerned in the celebration; and as it could not enforce this sanction on the officials of a foreign country, who were beyond its jurisdiction, it was driven to hold the marriage invalid as the only possible way left to it in the circumstances of enforcing its enactments. Sir R. Phillimore quotes the criticism of Fœlix in attack of the reasons of this judgment, to the effect that no more stringent interpretation could be put on these provisions in the case of marriages abroad than of those at home. The more equitable view of Fœlix is now the rule of the French Courts as exemplified in a considerable number of recent decisions, which, taken together, very definitely establish that the want of consents and publications will not alone invalidate a marriage of French subjects abroad unless it be "entaché de clandestinité," which last has been interpreted to mean an intention to evade the provisions of the domestic law.

These decisions have established further that the presence or absence of fraudulent intent is a question of fact to be left to "l'appréciation souveraine des tribunaux et cours d'appel"—as we should say, a jury question. One or more cases to this effect are to be found in nearly every volume of the *Journal de Droit International Privé*, and in each volume of the last decade of Sirey's *Recueil Général des Lois et des Arrêts*. According to the *Revue* this doctrine is now to be regarded as "d'après une jurisprudence constante." And it would not appear that publicity of any kind is essential to the validity, in France, of the marriage, where none such is required by the *lex loci*; that, for example, a marriage in Scotland by written consent or before two witnesses would not necessarily be "entaché de clandestinité" in France, the question, whether or not it did, depending on the view the Court might take of the facts as showing the intention of the parties (*Jour. de Dr. Int. Privé*, 1877, p. 43). The French decision on the Simonin-Mallac marriage falls into this series, for it was on the ground of

clandestinity, combined with no appearance for the defender, that the judgment in the French Court was based (2 Sw. and Tr. 73, *supra*, p. 295).

Though the French Code contains no provision similar to that of the Prussian and Austrian Codes, that the personal law of foreigners shall be regarded in the Courts of these countries, nor indeed any provision for the marriages of foreigners in France, it has been consistently maintained by French jurists that an equitable principle of reciprocity prevails in this matter in French jurisprudence. Of this opinion are Merlin de Douai, Fœlix, and Calvo, and others cited in Sirey (*Les Codes Annotés*, i. 20). This is confirmed by the fact that at one time an attempt was made by the French Legislature to establish a means, somewhat similar to those of the Prussian procedure, of informing its officials of the domiciliary capacity of foreigners proposing to celebrate marriage in France. Two different attempts were made to secure this end, both of which proved abortive, and at present no procedure of the kind is in force in France. The working of this principle is shown in the course of judicial decision in various aspects.

The clearness with which French law draws the line of distinction between capacity and form, and the consistency with which it applies its principles, is illustrated further in the interpretation put by the Courts on the "*formes usitées dans le pays*" of article 170, which have been held to include the validity of a marriage had in a country where the forms of celebration are exclusively religious, and where no civil forms—the omission of which in France would involve absolute nullity—exist, as in Brazil and the Argentine Republic (*Jour. de Dr. Int. Privé*, 1879, p. 281; 1881, p. 516). Consistency of practice is further preserved in the converse rule, that a marriage of French subjects abroad is invalid if not in accordance with the forms of the *locus celebrationis*, which the French law regards not, like Savigny, as optional merely, but obligatory. This was the subject of decision in the Tribunal Civil de la Seine in January last in the case of the marriage of a Frenchman with an Italian woman in Italy, celebrated only before a priest without the civil forms, which are obligatory in Italy as in France, an ecclesiastical ceremony (which may follow the civil one) being optional in both countries.

Taken along with the qualifications involved in these recent decisions, the summing up of Fœlix still expresses the state of the French law on the subject: "*Les qualités et les conditions requises pour pouvoir contracter mariage appartiennent sans aucun doute au statut personnel, et, par suite, le mariage contracté en pays étranger par un Français n'est valable qu'autant que ces dernier n'a pas contrevenu aux dispositions des art. 144 à 164 du Code Civil; c'est ce que porte l'art. 170 du même Code, et ce texte est conforme aux principes du droit international*" (i. 198).

To the same effect is the later work of Calvo, published in 1880.

His statement of the true principle of international law on this matter, which he takes to be the law of all civilized jurisprudence, all exceptions to which are mere erroneous deviations from the true path, is, "La règle qui domine en cette matière, c'est que la validité d'un mariage se détermine d'après la loi du pays où il a été célébré, de sorte que quand une personne se marie dans un autre pays, que le sien en accomplissant les formalités locales, la légitimité de son mariage ne peut être contesté q'en cas d'inobservation de la loi étrangère, *sans autre exception que celle résultant de l'intention évidente de se soustraire aux règles de son statut personnel ou de faire fraude à la loi de son pays d'origine.*" He then applies it to French marriages in particular: "La jurisprudence en ce qui regarde ces mariages contractés par les Français en pays étrangers prend pour point de départ la règle *locus regit actum* (la loi du lieu où l'acte est passé) et le principe; que les lois concernant l'état et la capacité des personnes régissent les Français même résidant en pays étranger." He carries the principle into cases beyond the express provisions of the Code, but which are the logical consequences of these provisions, that is to say, marriages in France between foreigners, or between a French subject and a foreigner, whose validity therefore depends on the law of the foreign domicile as to capacity, and on that of France as to form. "De sorte," he says, "qu'il résulte des différences qui existent entre les lois de la France et celles des autre pays, que le Français, qui se marie en France, s'expose à voir annuler son mariage pour des causes énoncées dans une loi dont il ignore les dispositions." This is merely carrying out the doctrine of the personal statute, as applied to matrimonial capacity, to its legitimate logical results. This doctrine would admit no such lame and impotent conclusions as that of Justice Cotton in *Sottomayor v. De Barros*, where, raising the hypothetical case of one of the parties being incapacitated by a foreign domestic law, while the other, domiciled in England, was free from incapacity, he would fling over the logical principle, and hold the marriage valid, on the ground that to annul it would be to work injustice to a British subject.

French law observes the rule, in opposition to the German view of Savigny and Bar, that the domestic law of each party must be severally satisfied as to his or her capacity. This was illustrated in a recent case of some notoriety. Musurus Bey, son of the Turkish Ambassador in London, eloped to England with the Countess d'Imécourt-Vassinhac, a girl of sixteen years old, and married her by special licence in Westminster. The mother of the Countess raised what we should call an action of declarator of nullity of the marriage under article 182 of the Code Civil, which gives a title to sue such an action to the persons whose consent was requisite to its validity, as well as to that one of the parties to the marriage who stood in need of the consent. The Cour de Paris, affirming the Tribunal Civil de la Seine, held the marriage null as contracted without the consent of the Countess's mother,

in fraud of the law of France, which was the domestic law of the bride, but not of the bridegroom. There appears to have been pleaded against the jurisdiction what is precisely the argument of Bar on the point, that the "qualité d'étrangère" fixed on the woman by her marriage with a foreigner withdrew her from the operation of French law in any question as to her capacity to contract it. One would be surprised to find the French Court doing other than it did, repelling the plea as a plain *petitio principii*, and positing the rule that the validity of a marriage depends on the personal law of both parties" (Jour. de Dr. Int. Privé, 1880, 300; 1882, 308).

The Code Civil established divorce in France for various causes, but, as is well known, shortly after the Restoration in 1816, divorce for any cause was abolished, the highest remedy left being "séparation de corps et de biens," equivalent to our judicial separation; and so, in spite of enlightened efforts for its resurrection since the establishment of the present Republic, the law still remains. The application of the principle of reciprocity would cover the capacity of a foreigner who had been validly divorced in his own country to marry again in France during the lifetime of his former spouse. Where both parties were strangers, merely making France their *locus celebrationis*, no difficulty would arise, but different considerations would come in where the foreigner proposed to marry a Frenchwoman, and further, where the first wife was a Frenchwoman. The determination of this question in France has been by no means "d'après une jurisprudence constante." Fœlix pronounces for the more liberal view, and notes the decision of a provincial tribunal in 1842 (apparently the only one which had yet emerged when he wrote) in support of it. His editor, Demangeat, however, is on the other side, expressing a moral horror of all divorce, and justifying the opposite view on the ground that the indissolubility of marriage by anything but death being, by the law of France, contrary to good morals and public policy, it cannot afford the reverse any countenance whatever. He quotes the reversal by the Cour de Cassation of the judgment cited by Fœlix and others in the inferior courts following it. Coming, however, to another decision of the same Court in 1860, which may be taken as inaugurating the acceptance of the view of Fœlix, he expresses extreme dissatisfaction with it, and maintains that in pronouncing it the Court has asserted but not reasoned. In fact it appears to have put him out of the calm temper becoming a jurist altogether, for he asserts that its recognition would logically involve that of a foreign marriage between brother and sister.

In the same note, however, he cites a decision of the same Court in 1818, where the logical converse of the doctrine he is combating was affirmed, to the effect that a person whose domestic law did not admit divorce could not—prior, of course, to 1816—invoke the aid of the French Courts to enable him to obtain a divorce in France.

To one trained in the law of Scotland or England, with its

almost fetichistic reverence for judicial precedent, there is nothing more puzzling than the behaviour of French tribunals in this respect. To find one Lord Ordinary deciding a question in a sense directly contradictory to that of the reported judgment of a brother Lord Ordinary—or perhaps two Sheriffs would be in some ways a better parallel—though perhaps not frequent, would not be regarded as unexampled, but to find him persisting in adjudicating future cases according to his own view, after a Division of the Inner House had deliberately and unmistakably pronounced in favour of the view of his brother judge, would certainly be disconcerting to the Scottish legal mind. On this point of the recognition of foreign divorces Sirey (Codes Ann. i. 21) cites four decisions on the one side and three on the other. The former list—to the effect that a foreigner divorced in his own country may validly marry again in France either a foreign or a French woman—is headed by the decision of the Cour de Cassation quarrelled with by Demangeat. Two of those to the contrary effect are prior in date to this one, the latter of them being in 1859, while the third is one from the local Court of Douai in 1877. Here is the Lord Ordinary persisting in holding to the older precedents seventeen years after the Inner House—or say even the House of Lords, for the Cour de Cassation in Paris has no Court of review above it—that the diametrically opposite view is the right one! This same judgment, however, was reversed by the same Court in 1878, and it has been followed by the Court of Amiens in 1880. With two judgments of the supreme national Court for it, may we now take it as settled law?

By a decision of the Cour de Paris in 1873 (Sirey, Rec. 1873, 2, 112) the liberty of the divorced foreign wife to marry in France is subject to one wholesome limitation. Article 228 of the Code forbids a woman to remarry before the elapse of ten months from the dissolution, from whatever cause, of her previous marriage. The above decision finds that this is one of the sovereign provisions of the French law, which cannot in any case be derogated from. And this not only though the foreign law contains no such restriction, but even, though it has provided other means of its own for obviating the possibility of a woman's marrying a second time, while the contingency existed of the emergence of progeny of the first marriage, or, it might be, of the adultery which brought about the divorce.

In England, though no decision on the point exists, it would of course have been the case, under the old criterion of the *lex loci contractus*, that a person under religious vows of celibacy at his domicile would be free to marry in England; and so, according to Lord Fraser, it would be in Scotland still. But if English law is now to be regarded as having changed front and adopted the *lex domicilii* as its determinant, the question assumes a different aspect. Westlake gives his opinion "with confidence" that such an incapacity would not be recognised in England. He rests his opinion on the

somewhat unsatisfactory ground that such a prohibition, being of a personal and penal nature, is limited to the territory of the enacting state. Penal, in the strict sense, it is not, for religious vows are voluntarily undergone. But be the law of England what it may, the French Court of Appeal has pronounced that a Spanish Capuchin monk, who had become domiciled in France by authorization of the government (in concealment of his ecclesiastical condition) but not naturalized, was incapable of marrying in France. The judgment proceeds on the view of the disastrous consequences of holding a marriage good in France, knowing that it would be held bad in Spain (Calvo, ii. 181).

(To be continued.)

SERJEANT BALLANTYNE'S "EXPERIENCES."

SERJEANT BALLANTYNE, one of the most popular counsel at the English Bar, has favoured the public with his experiences, professional and otherwise. They could not fail to form readable volumes. The learned author has witnessed so many strange scenes, and met with such a variety of characters in the course of the many years during which he has practised, that it would have been almost impossible for him to write a dull book. That it might have been better will, however, probably be the opinion of its readers. One expects so much from such a man as Serjeant Ballantyne. It is right to say that his own pretensions as an author are not great; he writes in a very modest tone, and as if fully alive to the literary defects of his book. He has certainly not been able to marshal his experiences or recollect their minute details as he is wont to do his facts when addressing a jury. Moral reflections suggest good stories, and good stories reflections, just as they might do in the smoking-room. Of course in a book of this sort want of arrangement does little harm, and has even a certain attraction about it. "If I were one of the industrious classes," he says, "I might sit down and rearrange what I have written; but if I did contrive to write a book orderly and in accordance with rule, my identity would be lost, and so if my details are confusing, I must throw myself upon the mercy of my readers, and ask them to pity my infirmities." These sentences occur, not in the preface, but about half-way in the second volume, and are, as he says, a proof of how incurable is his disposition. His memory seems to play him curious tricks. He has forgotten the name of the ship in which he returned from India in 1875, and of the regiment which entertained him while at Baroda. He is particularly weak in the matter of dates. He does not tell us when he was born, nor when he was called to the Bar. He has given us, however, a description of the state of London previous to his call which almost drove us to the conclusion that he must be

a very old man indeed—about the age of the century, if not older. We feel convinced, however, that this cannot be the case, and have finally concluded that his age falls short of the patriarchal. If in the matter of age we do him injustice he is entirely to blame. A man who gives to the public, in any form, his autobiography, may fairly be expected to furnish his readers with the leading dates.

Serjeant Ballantyne was born in London. He is out and out a London man, to whom the ways of that great city are very dear. His business hours have been spent in its Courts, his leisure in its clubs, and he worships that apostle of Cockneydom, Charles Dickens. His father, who had originally been in the army, became a member of the Bar, and at the time of his son's birth lived in Serjeants' Inn, Fleet Street. Apparently he did not succeed in the profession, and at the period when his son was called to the Bar occupied the position of magistrate at the Thames Police Court, a tribunal since abolished. Young Ballantyne had early associations with Criminal Courts, with a curious class of clients, and an equally curious class of attorneys. He has continued to be in the main an Old Bailey practitioner, and his experiences are chiefly obtained within the walls of the Central Criminal Court. It may not be the highest walk in the profession, but it is certainly one of the most interesting. No Chancery or Parliamentary barrister could easily have written so attractive a book.

He had, like many others, to undergo the experiences of hope deferred. His income for the first year was only four guineas and a half, while for the third it did not exceed seventy-five. He thus describes his earliest professional appearance:—

"I was instructed by a gentleman named Conquest to apply for the renewal of his licence for a theatre called the Garrick, situated in Leman Street, Whitechapel. This place of amusement was within my father's district, who was then a magistrate of the Thames police, and it was probably from this circumstance that so much confidence was reposed in me. I rose, but could see nothing, the Court seemed to turn round, and the floor to be sinking. I cannot tell what I asked, but it was graciously granted by the Bench."

He had more confidence, but apparently less success, when shortly afterwards, being "intrusted with a brief by a rather shady attorney of the Jewish persuasion," he proceeded to put a question suggested by his client. It was met by a direct negative. "'What a lie!' ejaculated my client, and dictated another question: the same result followed, and a similar ejaculation. By his further instruction I put a third, the answer to which completely knocked us over. My client threw himself back; 'Well,' said he, 'he is a liar, he always was a liar, and always will be a liar.' 'Why,' remarked I, 'you seem to know all about him.' 'Of course I do,' was the reply, 'he is my own son.'"

The Thames Police Court seems to have been a somewhat peculiar institution. Mr. Ballantyne, senior, had for his colleague an old sea-captain. "It was thought in those days," remarks the Serjeant,

"that the experiences of navigating a ship on the sea would be a good preparation for administering the law in connection with the river." The magistrates had a staff of police attached to their Court and under their control. These men used to be accompanied by young Ballantyne, he tells us, day and night. Doubtless in these strange localities, while witnessing many a curious scene, the youthful barrister acquired not a little information useful to him in his after career.

Although Serjeant Ballantyne is of course too thorough an English barrister to take note of how things are managed in Scotland, yet he is by no means blind to the defects of the legal system in his own country. One of the first anecdotes which he relates illustrates very forcibly the absurdities of private prosecutions. A Turk who had been robbed was bound over to prosecute at the next sessions. As he could not find bail he was committed to prison. The accused did find bail and became a free man. "The sessions arrived, and, as might be expected, the thief did not. Ben Hyam, after the loss of his earnings and his liberty, was released. What became of him I never heard, but his reflections upon English justice could hardly have been higher than those we entertain about an Eastern *cadi*." The Serjeant adds, "I have met with an account of the above incident as having occurred in Russia, but I can vouch for the accuracy of my statement, and that it occurred in London about the year 1830." We can assure Serjeant Ballantyne that such a miscarriage of justice would have been impossible in this despised little country north of the Tweed. The thief might indeed have escaped, but his victim could not have suffered the punishment.

Recent attention has been called to the case of accused persons being convicted in England before presumably competent Courts and judges of great eminence for crimes which they never committed. Blunders of this class, the consequence of which it is positively horrible to contemplate, Serjeant Ballantyne is inclined to attribute in some measure to the fact that many of the English judges are, from their previous training, wholly unfitted to deal with criminal cases. A barrister, for example, who practises in the Court of Chancery, may have no experience in the art of examining witnesses. This is what our author says:—

"The amalgamation of the Common Law and Equity systems is now an accomplished fact, although the procedure is still very different in the different Courts, and judges are called upon to deal with causes by means utterly novel to them; but this, doubtless, will all come right in time, after a reasonable number of suitors have been ruined; but I venture to suggest that this change affords the opportunity that has been long wanted of initiating a radical alteration both in the practice and the procedure of Criminal Courts. I certainly do not make the observations I am about to from any doubt of the eminent ability of members of what was called the Equity Bar, but surely it can hardly be conceived that

they are fitted to be taken from the midst of affidavits, with no knowledge of oral testimony or of the habits and character of those who occupy the proceedings of the Crown Courts, to preside upon some complicated question, involving the life or the slavery for life of a human being."

He has a conscientious belief that "the employment of untrained men to try grave criminal charges is a great and serious evil." Judges of this stamp may, as he points out, do mischief in two ways. They may cause the guilty to go free, and may lead to the conviction of the innocent. He mentions one case in which he was concerned—a trial for murder. The facts proving the prisoner's guilt were to his mind conclusive, but "Mr. Justice Blackburn impressed those who heard him sum up upon this occasion with the idea that he was labouring under a sense of hesitation and doubt; and juries [*sic*], always loath to inflict the penalty of death, were affected by his demeanour. On this occasion this very distinguished man fully exhibited his kindly nature and his inexperience." In another place he says, "The public have had their attention called to two recent cases connected with the administration of the criminal law. Both of them happen to have been tried by the same judge, whose intellect is of the highest order, and before whom it has frequently been my pleasure to practise. He was selected from the highest rank of the Chancery Bar. In the first of these cases a prisoner was left for execution. The colleague of the judge fortunately entertained doubt, and inquiries were readily instituted, and the result was the discovery of the man's innocence. In another case two men had undergone a long term of imprisonment, part only of a much longer sentence, well deserved, if they had been guilty. They have been shown to be perfectly innocent, pardoned, and recompensed. I was not present at either of these trials, but some who were have told me that the judge took a perfectly just view in both cases; but he had to address county juries of the commoner class, and in both instances they were governed rather by details that shocked their feelings than by the evidence that ought to have controlled their judgment." He further points out that on Circuit inexperienced judges are often assisted by junior and inexperienced barristers, and hence the risk of a miscarriage of justice is increased.

It may be said that these are only the prejudiced notions of a criminal lawyer who views with dislike the invasion of his own department by men who have been educated in another school; but nevertheless they have much which recommends them to common-sense.

Holding such opinions, it is not surprising that he should advocate a Court of Appeal in criminal cases. "The Court of Appeal," he says, "ought to have the power of both diminishing and increasing the punishments inflicted by the judges of first instance. It would not be called upon to rehear the cases, but decide, as is done

at present by the tribunals who hear motions for new trials in civil suits, members of the Criminal Appeal Court being embodied with the High Court of Justice, and receiving aid from their brother judges." Another ground urged "is one which only affects England." Such a Court of Appeal, he argues, would abolish a discreditable anomaly. By an expensive process criminal cases may at present be removed into the Court of Queen's Bench, where, in spite of the position of the judge and jury, a verdict is not necessarily final. We have here again a striking instance of English legal inconsistencies.

Serjeant Ballantyne is in favour of the old system of transportation. He thinks that it created much dread to the criminals, and had also a wholesome effect upon their friends and accomplices. Further he observes, "There are classes of criminals that can never be reformed whilst they are allowed to remain in this country, and yet their offences may not justify imprisonment for life. In another country they might find an opening for redemption, in this none. There may be political grounds which make it impossible to revert to the system of transportation. With these I am not capable of dealing, but my experience may be trusted for knowing that, next to death, it inflicted the greatest terror, and to those capable and desirous of repentance the only chance of reformation." Whatever may be the advantages of transportation, we fear that the "political grounds" render it hopeless to expect that this mode of punishment will be revived. Colonies will not sacrifice themselves merely that experiments may be tried with the felons of the mother country, and that colony must indeed be in a far from flourishing condition which would invite the assistance of convict labour. Transportation as a punishment operated, we suspect, very unequally. Serjeant Ballantyne mentions a case in which a young lady in Marshall & Snellgrove's, "one of the handsomest young women I have ever seen in my life," was sent abroad for fourteen years. Her crime was theft. On board the ship she captivated either the doctor or the parson, married him, and lived as his servant-wife. "I am told," he adds, "that many happy marriages of this class were made." In a convict prison at home good looks will not avail their possessor.

Serjeant Ballantyne's "Experiences" of course contain numerous good stories of Bench and Bar. In this respect they fall short of certain Scottish works belonging to the same category. We meet with no barrister to be compared with Henry Erskine either as a wit or a gentleman; with no judges such as Kames or Monboddo, although we must at the same time confess with none so offensive as Braxfield.

The description which he gives of the Old Bailey Court in its unreformed days suggests many an abuse, and he indeed tells us that "the mode in which business was conducted in that tribunal made it a term of opprobrium to be called an Old Bailey barrister."

The city appointed the judges who sat as commissioner, common serjeant, and recorder. The sittings lasted from nine in the morning until nine at night; of course this involved much eating and drinking. "Two luxurious dinners," he tells us, "were provided, one at three o'clock, the other at five. The ordinary of Newgate dined at both. The scenes in the evening may be imagined, the actors in them having generally dined at the first dinner. There was much genial hospitality exercised towards the Bar, and the junior members were given frequent opportunities of meeting the judges and other people of position; but one cannot but look back with a feeling of disgust to the mode in which eating and drinking, transporting and hanging, were shuffled together." He recollects an ordinary who attended both dinners very punctually, and "never affronted the company by abstinence at either." He had to pray on these occasions for the principal officials, and was asked why he did not name the Under Sheriffs. "I only pray for great sinners," was the reply.

Of the rubbish to which these city-appointed judges gave utterance the following may serve as an example: "I assure you, gentlemen," said Mr. Commissioner Arabin, speaking of the inhabitants of a certain town, "they will steal the very teeth out of your mouth as you walk through the streets. I know it from experience."

The following is a scene from the robing-room of the Old Bailey. The actors are Adolphus, a faded hero, whose business had fallen away, and Phillipps, the rising man into whose hands it had come. "You remind me," says the first, "of three B's—Blarney, Bully, and Bluster." "Ah!" was the reply, "you never complained of my B's until they began to suck your honey." Can anything more thoroughly vulgar be conceived? Mr. Adolphus occasionally appeared in other courts, and one smart reply of his, made in the Court of Queen's Bench, reminds us of our own Erskine or Clerk. The judge was Tenterden, said to be much under the influence of Sir James Scarlett, to whom Adolphus happened to be opposed at the time. In reply to something which the latter had said, Sir James remarked, "Mr. Adolphus, we are not at the Old Bailey." "No," was the response, "for there the judge presides and not the counsel."

We have said that Mr. Ballantyne, senior, was a magistrate at the Thames Police Court. Of his quondam colleague, a certain Mr. Broderip, the following story is told: Mr. Broderip took much interest in natural history, and on one occasion in the Marylebone Police Court he chose to exercise his skill in that science. Young Ballantyne had appeared before him in a filiation case for the man, who was unsuccessful. "'You made a very good speech,' said the judge, 'and I was inclined to decide in your favour; but you know I am a bit of a naturalist, and while you were speaking I was comparing the child with your client, and there could be no

mistake, the likeness was most striking.' 'Why, good heavens!' said I, 'my client was not in Court, the person you saw was the attorney's clerk.'"

The following story of Mr. Justice Alan Park is almost too absurd to be credited: "In his latter days he had acquired a habit of thinking aloud which led on one occasion to a rather amusing incident. Whilst trying an old woman upon a charge of stealing fagots he unconsciously ejaculated, 'Why, one fagot is as like another fagot as one egg is like another egg.' The counsel defending the case heard the observation, and repeated it to the jury. 'Stop,' said Sir James, 'stop; it is an intervention of Providence. This was the very thought that passed through my mind. 'Gentlemen' (addressing the jury), 'acquit the prisoner.'"

These volumes contain some interesting information relating to serjeants-at-law. The peculiar title gives rise to mistakes even in England. "Once," Mr. Ballantyne informs us, "after I had attained this rank I was counsel before a court-martial at Aldershot, and most hospitably invited to dinner at the mess—I think it was of the Welsh Fusiliers. When I presented myself, and announced my name and title to the orderly, he informed me, with a scornful air, that it was an officers' mess." But the serjeants hold a good rank, and are entitled, if we mistake not, in heraldry to open visors. As our readers are probably aware, their days are numbered, the more modern body of Queen's Counsel having gradually taken their place, and now there remain only a few elderly men mournfully contemplating the extinction of their race. The property of Serjeants' Inn was sold some years ago, when a testimonial was presented to Mr. Ballantyne by his brethren for his long and valuable services as their treasurer. The roll of serjeants contains, it is needless to say, nearly all the most famous names in the history of English law. Serjeants formed a brotherhood, and hence the use of the term "brother" by members of the English Bench, an epithet only recently, we think, adopted north of the Tweed.

Lord Campbell with characteristic bitterness has described the serjeants of his day as a "very degenerate race." The body at that time included such names as those of Shee and Pigott, both afterwards eminent as judges. There was also a Serjeant Stocks, whose opinion of Campbell could not have been a high one, as he pronounced him to be the greatest jobber that had ever flourished at the Bar. Concerning another—Manning—Serjeant Ballantyne says, "I can thoroughly well understand the contempt that Lord Campbell entertained for him, as he never knew how to turn his knowledge into profit." Campbell was, of course, himself a serjeant, and presided when Ballantyne was admitted in 1856.

The author refers to many interesting and sensational trials in which he has been engaged. Our readers will readily remember two—the Tichborne suit and the trial of the Gaekwar of Baroda. The Serjeant only took part in the civil proceedings originated by the pretensions of Arthur Orton. Upon the truth or falsehood of that

wonderful romance in real life he will not pronounce, as he does not consider that it would be right for him to disclose anything which in his capacity as counsel may have become known to him. It is not difficult to discover his opinion. At their first interview his client seems to have rather puzzled him. The hands and feet of an aristocrat were observed, but at the same time manners which were not those of a person who had ever moved in good society. Upon the conduct of the defence he is severe. The withholding all evidence of the tattoo-marks is condemned, and the reason afterwards given for doing so—that the claimant might have created the marks if he had been informed of their existence—justly treated as nonsense. The Serjeant thinks that had such a man as Mr. Hawkins led from the commencement, the case would have been crushed at its very outset. Had the claimant been asked the question about the marks "in the way that Hawkins would have put it, and attempted to shuffle, he would have been simply told to hold out his arm, and the non-existence of any such marks would have been destructive to the trial." There is also an opinion expressed that had the Chief-Justice, upon the conclusion of the claimant's cross-examination, asked his counsel whether they could hope for a verdict, the answer would have been in the negative.

The Gaekwar's trial has formed probably the most exciting event in the learned Serjeant's by no means monotonous career. That prince, it will be remembered, was accused of having attempted to poison the British Resident, Colonel Phayre. A Commission was appointed to try the case, composed of Englishmen and natives in equal numbers. It was determined to retain counsel from England, and Serjeant Ballantyne agreed to forsake the clubs and courts of London for a season, and incur all the risks of a visit to India. A very pleasant time he seems to have had of it. As the defender of a popular prince he had roses showered upon him, and addresses presented of a truly Eastern description. Was ever Old Bailey practitioner so honoured? The natives assured him that their hearts were filled with rising joy at the mention of his name. As to the merits of his client's case he gives a decided opinion. The Commission were unfortunately divided in their views, and no verdict was ever delivered. There seems to have been no doubt that poison was placed in Colonel Phayre's sherbet, but according to Serjeant Ballantyne, this was the act, not of the Gaekwar, but of his enemies, who wished to retain the colonel's services, and defeat the efforts which were being made to secure his removal. The reasons for this opinion are ably stated, and the whole narrative of the author's Indian expedition forms perhaps the most readable part of the book.

In this short notice we have dealt merely with Serjeant Ballantyne's legal experiences as alone suitable for these pages. There are, however, many non-legal incidents recorded which are of considerable interest, and doubtless the book will attract a large class of non-professional readers.

FOURTEENTH REPORT OF THE JUDICIAL STATISTICS OF SCOTLAND FOR 1881.

CRIMINAL STATISTICS OF COUNTIES AND BURGHS.

THIS is the fourteenth of the series. These reports evidence great industry in collecting and tabulating. It was a maxim of Lord Brougham that "full and minute statistical details are to the law-giver as the chart, the compass, and the lead to the navigator." Admitting the truth of his Lordship's saying, it has often occurred to many that the expense and trouble of the collection and adjustment of these complicated tables exceed any practical benefits, and few have the courage to read them. Some important points may be of advantage accurately to ascertain, but there are other minute details which it is uncertain if complete accuracy can ever be obtained, and though it were, it is very doubtful whether any benefit can be derived from the knowledge. The issue of this ponderous Blue-Book, consisting of 135 folio pages, was somewhat later in the season than any of those of previous years.

The report, as usual, commences with what is called an "Adjustment Table," or discrepancies between the report of 1880 and that of 1881. It is, in short, a big *errata* table, "from explanations made by returning officers"—not those in election matters, but those from whom the statistics have been obtained. The discrepancies are most trifling, and cannot in the smallest degree affect the general results. Thus it appears that *one* prisoner was omitted to be returned from the prison of Inveraray, and *one* case overlooked in 134 cases in the First Division of the Court of Session, and *one* case to be added to 1497 cases in dependence in Sheriff Courts—one not being returned by the Sheriff Clerk at Kirkwall.

The first table is entitled "County Police Establishments and Effective State of Force on 31st December 1881." This table enumerates the population of each county according to the census of 1871—the sum-total is 1,919,589. The police establishments number in all 1371 persons, divided thus: 32 chief constables, 36 superintendents, 72 inspectors, 142 sergeants, 1073 constables, 4 supernumerary constables (2 assigned to Ayr, 1 to Berwick, and 1 to Haddington), 12 detective officers. Of the 1371 police as *authorized* there appears 1363, and as *not* authorized 8. We had the notion that all our police force acted *under authority*, and certainly some note of explanation ought to have been given. It appears somewhat strange that the same number of "unauthorized" is attached to Ayr and Berwick as is given for the detectives, from which it might be inferred that detective officers act without authority. Lanark stands highest in the police force, having 186 constables; Ayr comes next with 92, Aberdeen and Renfrew have each 67, and Edinburgh ranks fifth with 61 constables. Cromarty has only 1 chief and 2 constables!

The next table gives the expenses of the county police. The whole expenditure is stated to amount to £125,580, 13s. 11d., divided thus (omitting parts of pounds):—

Salaries and pay	£98,765
Allowances and contingent expenses	7,888
Clothing and accoutrements	6,790
Superannuations and gratuities [?]	123
Horses, harness, forage, etc.	254
Station-house charges, stationery, etc.	12,541
All other charges [?]	4,216

The sum received from the Treasury during the year was £49,898. The highest sum paid for the county police establishment is Lanarkshire, which is set down at £21,600. The next in amount is Ayr at £11,566, the third is Renfrew at £10,179. Cromarty ranks the lowest in expense, being only £149 for its 3 constables, and it obtains £66 from the Treasury.

POLICE ESTABLISHMENTS AND EFFECTIVE STATE OF FORCE ON 31ST DECEMBER 1881.

The population of each burgh is given according to the census of 1871, and the totals are—

Burghs	1,395,169
Counties	1,919,589
Total	3,314,758

The police force at the above date was—

Burghs	2377
Counties	1371
Total	3748

The same remark applies to this table as it did to that of the counties. Of the 2377 no less than 166 are entered as "not authorized." Eighty-one of that number are placed under Glasgow, and 50 are assigned to Greenock, and 14 are allotted to Dundee, and 11 to Aberdeen, with notes that they are "harbour police, and no Government grant," but it is presumed, though not thus paid purely by Exchequer, they do nevertheless act "with authority." The remainder unauthorized are assigned to other burghs—3 to Banff, and 2 to Edinburgh, Arbroath, and Partick, and 1 to Brechin. As to the present strength of the different forces, Glasgow has the highest number, being 1004. Edinburgh has 403, Aberdeen 114, Paisley 51. Several burghs of considerable populations boast of a very small amount of police protection. Ayr and Kilmarnock have each only 21; Hamilton, 18; Inverness, 14; Montrose, 12; and Forfar, 9; whilst several others are stated as content with very few, some with only two or three.

Another table follows with the expenses of the burgh establishments. The expense of the police in burghs for 1881 amounted to

£199,560, of which £81,990 was received from the Treasury. The expenditure for county police was £125,580, for which £49,898 was paid by the Treasury. Thus the whole expenditure of the police in Scotland was £325,140, of which £131,889 was paid by the Treasury.

The expenditure is thus apportioned: For salaries and pay, £168,922; allowances and contingent expenses, £616; clothing and accoutrements, £12,104; superannuations and gratuities, £1141; horses, harness, and forage, £888; station-house charges, printing, stationery, etc., £7857; all other charges, £8027—total cost, £199,560. Sum paid by her Majesty's Treasury during the year, £81,990. A column for "superannuation and gratuities paid out of the superannuation fund" is left blank! The total expenditure for Glasgow is stated as £87,707, whereof £36,278 was paid by the Treasury. Edinburgh cost £37,890, and received £15,111 from Exchequer. Leith cost £4303, and received £1948. Dundee cost £15,208, and received £6092. Aberdeen cost £7389, and received £3202. A study of these tables raises serious considerations as to the amount of force in several police burghs in comparison to their respective populations; and, again, as to their expense in contrast to the number of police in other burghs. It appears that large establishments are much more economically conducted than those of smaller size.

There are given "*Retrospective Tables*," the first being "a comparative table of (1) the establishments; (2) the effective state of forces; and (3) the expenses of the establishment for the *three* years ending in 1881 on 31st December each year."

In counties the results are thus stated:—

	1879.	1880.	1881.
Total establishments	1322	1331	1371

(These figures are divided amongst *eight* sections of the force.)

The expenses of establishments were—

1879.	1880.	1881.
£119,015	£125,134	£125,580

(These sums are divided amongst *seven* branches of expenditure, as stated above.)

Sums paid by her Majesty's Treasury within the year—

1879.	1880.	1881.
£48,189	£48,425	£49,898

In burghs the results are thus stated:—

1879.	1880.	1881.
2340	2371	2377

(Allocated amongst similar eight divisions, same as in *counties*.)

The expenses of the establishments were—

1879.	1880.	1881.
£185,956	£191,278	£199,560

(Divided amongst the *seven* branches of expenditure.)

Sums paid by her Majesty's Treasury within the year for burghs—

1879. 1880. 1881.
£79,613 £81,979 £81,990

In the report additional three columns are given, wherein the results of counties and burghs are combined. With submission we think this an unnecessary trouble and expense, seeing that any person who was desirous to ascertain the fact could easily have obtained the knowledge for himself. A column is appended giving the "triennial average ended [ending?] 1881." This must have cost considerable trouble in calculation, and is of little benefit, seeing that the averages are for the most part nearly identical.

The second table in the report is a "retrospective table," being termed "comparative table of the number of persons charged and disposed of [?] by the Police in Scotland in the five years ended [ending?] 1881." We can conceive that fitter terms than "charged" and "disposed" might have suited the operations of police. The following are the minute and somewhat confused enumeration of offences, offenders, and results:—

IN COUNTIES.

<i>Disposal of Persons charged by the Police.</i>	1877.	1878.	1879.	1880.	1881.
1. Number apprehended or cited . . .	31,769	30,195	27,895	29,584	29,324
2. Whereof for—					
(1) Offences against the person . . .	5,095	4,680	4,323	4,727	4,770
(2) Offences against property . . .	5,445	5,592	5,612	5,656	5,632
(3) Miscellaneous . . .	21,229	19,923	17,960	19,201	18,922
3. Result of proceedings—					
a. Tried at instance of police . . .	24,137	23,741	22,187	23,487	23,100
b. Committed for trial . . .	1,196	1,239	1,193	1,197	1,060
c. Not in a or b . . .	6,436	5,215	4,510	4,900	5,174
<i>Disposal of those tried at instance of Police in a, No. 3.</i>					
1. Convicted . . .	22,495	22,250	20,581	21,838	21,540
2. Acquitted . . .	1,642	1,491	1,606	1,649	1,560
<i>Disposal of those not tried in c, No. 3.</i>					
1. Proceedings dropped . . .	6,058	4,902	4,243	4,561	4,795
2. Standing over untried at end of year . . .	378	313	267	339	379
<i>Disposal of Charges.</i>					
1. Number of offences reported or made known to the police . . .	28,901	27,745	26,304	28,090	28,219
(1) Offences reported . . .	21,476	21,322	19,500	20,624	20,588
(2) Offences otherwise made known to them and entered in their books . . .	7,425	6,423	6,804	7,466	7,630
2. Nature of these offences—					
(1) Offences against the person . . .	4,937	4,529	4,235	4,750	4,804
(2) Offences against property . . .	6,443	6,671	6,875	7,208	7,188
(3) Miscellaneous . . .	17,521	16,545	15,194	16,132	16,227
3. Analysis of charges—					
(1) Offences for which one or more persons were either apprehended or cited . . .	23,983	22,874	21,305	22,468	22,380
(2) Offences for which no one has been apprehended or cited . . .	4,918	4,871	6,839	6,622	5,830

IN BURGHS.

<i>Disposal of Persons charged by the Police.</i>					
1. Number apprehended or cited . . .	110,577	108,919	93,968	104,937	106,307
2. Whereof for—					
(1) Offences against the person . . .	4,305	3,963	3,464	4,025	3,925
(2) Offences against property . . .	11,722	12,314	12,479	11,581	11,170
(3) Miscellaneous . . .	94,550	92,642	78,025	89,331	91,212

	1877.	1878.	1879.	1880.	1881.
3. Result of proceedings—					
a. Tried at instance of police	96,672	95,866	82,281	93,562	94,140
b. Committed for trial	3,138	3,665	3,368	3,149	3,206
c. Not in a or b	10,767	9,338	8,319	8,226	8,961
<i>Disposal of those tried at instance of Police in a, No. 3.</i>					
1. Convicted	90,628	90,063	76,367	86,824	87,129
2. Acquitted	6,044	5,803	5,914	6,738	7,011
<i>Disposal of those not tried in c, No. 3.</i>					
1. Proceedings dropped	10,643	9,321	8,257	8,156	8,883
2. Standing over untried at end of year	124	67	62	70	128
<i>Disposal of Charges.</i>					
1. Number of offences reported or made known to the police	99,141	97,218	85,558	94,566	95,511
(1) Offences reported	79,308	77,463	71,634	79,254	78,717
(2) Offences otherwise made known to them and entered in their books	19,838	19,755	13,924	15,312	16,794
2. Nature of these offences—					
(1) Offences against the person	3,928	3,653	3,204	3,772	3,710
(2) Offences against property	19,571	19,407	19,159	18,791	17,999
(3) Miscellaneous	75,642	74,158	63,195	72,003	73,802
3. Analysis of charges—					
(1) Offences for which one or more persons were either apprehended or cited	86,857	85,259	74,002	83,189	84,641
(2) Offences for which no one has been apprehended or cited	12,284	11,959	11,556	11,377	10,870

Note.—Under every subdivision the totals are added together and found to agree.

It is noteworthy the remarkable variations not only of persons charged, but the offences for which charged during the five years of the series. In the year 1879 there appears 27,895 persons charged in counties, whereas in the year 1880 the number is increased to 29,584. Of offences against the person there were charges of 5095 in the year 1877, reduced to 4770 in 1881. The number of "*miscellaneous cases*" both in counties and burghs are very great, and must comprehend proper police offences, such as pavement-cleaning and carpet-beating. The results of trials both in counties and burghs are satisfactory, showing the great and uniform proportion of convictions over acquittals during the five years. The vast number of "*proceedings dropped*" is matter of grave consideration, showing that rash charges are often made, and so far entertained. This table is worthy of much consideration as showing the fluctuations in crime in different years.

The table II. gives under a variety of branches the number of persons charged and disposed of by the police (?) in the counties and burghs of Scotland in the five years ended (ending ?) in 1881. Table VII. now distributes amongst the *counties* for the year 1881 "the persons charged, offences, disposal of persons charged by the police, and results of prosecutions." Under the head of "*persons charged*" the total number of *persons* charged by the county police during the year 1881 was 29,324, of which 24,703 were males and 4621 females. The numbers allocated to the different counties give no satisfactory criterion as to the amount of crime, seeing that it is only the rural districts that fall within the scope of these tables, the burgh police being assigned to another and subsequent table. The nature of the offences are subdivided under *seventeen* particulars,

making a total of 4770 offences. Of murders there are 18 placed against *ten* counties, 4 of them appearing under the county of Selkirk. *Offences* against *property* amount to 5632. The greatest number of offences against the *person* are placed under the head of "*Assaults*," and against *property* the great proportion rank under the head of "*Theft*." One singular circumstance is observable in these tables, that under the specification of *offences* stands a column for the ancient crime of "*stouthrief*," but no such offence having occurred within the year it consequently remains a blank! This desire to enlarge the meshes of the criminal net to catch all *offenders* and include all *offences* is evidenced by a column added to the *sixteen* species of offences, entitled "*offences not included in any of the preceding*," and which receives not one entry! The *miscellaneous* offences are tabulated into no fewer than *twenty-six* separate columns—and yet the statist, not having satisfied his morbid appetite, has an additional column for "*offences not included in any of the preceding*" (!), and another for "*contraventions not included in any of the preceding*." He, however, has been more successful here than he was in a previous case of innominate crimes, as he has caught 2648 offenders in these columns. It would have been very desirable to have learned what *special* offences these unfortunates had perpetrated where no known name could be given to them. The unenviable character of "*mischiefs*" sometimes characteristically assigned to Scotsmen is supported by no less than 1665 ranking under the heading of "*Malicious Mischief*," being the next highest number after that of "*Theft*" in the criminal calendar. Some persons may be startled in finding under "*Miscellaneous Offences*" no fewer than 20 persons charged with "*lunacy* under statute"! No person, however, will be surprised on finding 1941 ranking under the head of "*Drunk and Incapable*," and this *outside* the burghs. The greater number (505) of these pests are placed under the county of Lanark. Seven counties appear from these tables exemplary for sobriety, no one appearing to have been charged with this too common offence within the bounds of these highly-favoured counties. They are deserving of being honourably mentioned, viz. Bute, Clackmannan, Cromarty, Inverness, Kincardine, Kinross, and Roxburgh. Of poaching cases there were 636 charges, and of these 95 were for night-poaching. It is pleasing to find only 5 charges of "conspiracy to raise wages and intimidation of workmen." Some remarkable inferences may be drawn from the number of offenders convicted and acquitted in different counties. Thus in the county of Aberdeen 1249 offenders were convicted, only 47 were acquitted. But in Argyle 822 were convicted and 102 acquitted. Looking over this table, there is a strange variation in different counties between the convictions and the acquittals. This may arise in two ways, either on the one hand by extreme rashness on the part of the police, or on the other hand by laxity on the part of the magistracy.

The seventh and eighth tables distribute amongst the thirty-two counties "*Charges taken*" and their disposal. Lanarkshire (burghs excluded) is by far ahead of any county in Scotland. In table VII., under the head "*Desertion of Service*," under the general head of "*Miscellaneous*," two charges appear opposite the county of Edinburgh, but it is remarkable that they are dropped in the next table, which remains a total blank, as if the charge received no disposal. Desertion of service is perhaps not a proper police offence, and hence the vacuity of this column. There appears a somewhat singular classification under heading "*Charges taken*," viz. "number of charges *reported* to the police," and "number *otherwise* made known to them and entered in their books or records." Under the first class there appears 20,589; under the second class, 7630. But several counties give no return of any falling under the second. Aberdeen, Argyle, Fife, and Renfrew are amongst those who appear to exercise no functions unless where the "charges are *reported* to the police." This certainly requires some explanation. Of 28,219 "charges taken or made known to the police and entered in their records," no fewer than 5839 are "offences for which no one was apprehended within the year." This may create some doubt as to the efficiency of the police in certain quarters. The variation between these two columns in different counties is somewhat strange. Thus in one county, out of 804 cases only in 453 were "one or more persons apprehended," and in 351 "no one was apprehended"!

Tables IX. and X. give the burgh returns, tabulated in the same order as is done with the counties in tables VII. and VIII. In the 39 burghs there were "apprehended or cited" within the year for offences 106,237, of which 74,159 were males and 32,078 were females. During the same year the number of persons "apprehended or cited" in counties was 28,985, making a total of offenders thus dealt with by the police in counties and burghs of 135,222. Of charges against the person there were 8695, and against property 16,802. The miscellaneous offences amounted in burghs to 22, which with two additional columns for innominate offences not included under known offences show in urban populations 91,212 offences perpetrated. Of 94,140 persons put on their trial, 87,129 were convicted and 7011 acquitted, and proceedings dropped against no less than 8833, which certainly requires explanation. Under the column of "*Drunk and Incapable*" there rank 26,859, of which Glasgow claims 14,688, Edinburgh takes 2610, Dundee 1813, and Greenock 1367. It is remarkable how this widespread calamity is distributed amongst the burghs, some enabled to boast of almost a clean bill. Banff only reports two belonging to this class, and Annan and Pulteneytown have each only one "dead fly" to mar their otherwise high character for sobriety. Adding the contingent of drunken disorderlies to the county class, there appears an army of 28,785 of incapable

inebriates in Scotland! Table X. is similar to table VIII. of the county police, and is divided and subdivided into many columns. It shows Herculean labour in thus tabulating figures, but it may be doubted whether the practical results are equivalent to the time and cost. We confess we cannot well perceive how ten columns are set without a single unit in any one. Two of these are assigned to "day and night poaching," which we should conceive to be rare in burghs. Again, here, as in counties, out of 95,511 offences "reported or made known to the police," it is recorded that in 10,870 "*no person* was apprehended or cited"! which, compared with 5839 out of 28,219 in counties, rather contrasts favourably to the vigilance of the county police. These tables command the close attention of the authorities both in counties and burghs.

The police statistics both of counties and burghs, after having been specified in ten tables (*decatalogue*), are followed with a variety of similar tables under the title of "*Criminal Offenders, viz. persons committed for trial and bailed*," being "a digest of returns by Sheriffs of counties under the provisions of 2 Geo. IV. and 1 Gul. IV. cap. 37, sec. 15, for the year ended [ending?] 31st December 1881." There is a mistake, in fact, in these titles by limiting offenders to "persons committed for trial *and bailed*," seeing that many of the persons are committed for crimes which are not bailable, and persons having that privilege nevertheless may be unwilling or unable to find the stipulated bail. The first table presented is "retrospective," being a "comparative table of the number of criminal offenders in Scotland in the five years ended [ending?] 1881." This is an exceedingly interesting table. The same quinquennial table is given under the head of "*Police Statistics*" (Table II.), and considerable information may be gained by comparison of the two sets of tables, only that persons appearing in the police table may appear again in the subsequent table. In the first police table the number of persons "*apprehended or cited*" is given during the five years; in the second table the number is limited to persons "*committed for trial*." Perhaps the numbers might, as in police cases, have been distributed amongst the 32 counties and 39 burghs. The retrospective table is as follows:—

	1877.	1878.	1879.	1880.	1881.
1. Number committed for trial, including those standing over from previous year . . .	2949	3191	2945	2818	2850
Number undisposed of at the end of the year . . .	269	245	235	206	223
2. Number disposed of within the year . . .	2680	2946	2710	2612	2427
Number not called for trial, being discharged [?] . . .	348	370	353	286	346
3. Number called for trial . . .	2332	2576	2357	2326	2081
Whereof—					
1. Convicted . . .	2009	2273	2091	2046	1832
2. Outlawed and bail forfeited . . .	26	17	9	19	10
3. Found insane and unfit for trial . . .	8	0	4	5	0
4. Acquitted on grounds of insanity . . .	0	4	0	1	4
5. Acquitted, Not guilty . . .	118	86	79	95	63
6. Not proven . . .	176	196	174	160	172
4. Courts by which tried—					
1. High Court of Justiciary . . .	55	98	105	95	104

	1877.	1878.	1879.	1880.	1881.
2. Circuit Courts	392	359	318	263	317
3. Sheriff Courts—					
(1) With jury	1052	1235	1129	1188	1006
(2) Without a jury	827	882	805	778	648
4. Burgh Magistrates	6	2	0	2	4
5. Justices' and other Courts	0	0	0	0	2
5. Sentences of prisoners convicted within the year—					
1. To death (including sentences afterwards commuted)	0	4	0	0	1
2. To penal servitude	132	204	182	131	161
Namely—					
5 years and under	28	39	65	67	99
6 years	0	0	0	0	0
7 years	82	87	58	42	28
10 years and above 7	20	50	28	16	27
15 years and above 10	3	22	27	5	7
Above 15 years	1	3	3	1	0
Life	0	3	1	0	0
3. To imprisonment	1816	2004	1849	1838	1613
Namely—					
Detained [?] in Reformatory Schools	12	18	26	12	18
1 month and under	510	545	496	432	383
3 months and above 1	460	489	493	472	438
6 months and above 3	346	458	400	407	350
1 year and above 6 months	327	358	311	323	322
2 years and above 1 year	161	141	123	142	107
3 years and above 2	0	0	0	0	0
4. To whipping, fines, etc., and discharged on sureties	37	23	28	22	15
5. Number not sentenced [?]	24	38	32	55	42
6. Ages of the above—					
12 years and under	16	17	14	11	7
16 years and above 12	92	107	124	84	77
21 years and above 16	518	604	471	492	449
30 years and above 21	668	744	744[?]	720	648
40 years and above 30	338	465	389	396	344
50 years and above 40	200	212	224	204	183
60 years and above 50	102	90	84	100	81
Above 60 years	23	33	37	37	32
Age not ascertained	2	1	4	2	1
7. Number convicted under aggravation of previous conviction[s] ?	722	850	809	833	769
8. Number found to be habit and repute thieves	12	17	21	18	14
9. Number convicted of more than one offence	95	77	113	120	74

A table is given of the “numbers committed for trial.” The first section is “*offences against the person*,” divided into fifteen descriptions of crime. Simple assaults form the greatest portion of criminal offences, amounting to 554. Forty-five “criminal offences” stood over at the end of the previous year, 1880; committed during the year, 735—making a total of 780, of which 686 were males and 94 females. At the end of the year 1881 there remained 223 “untried,” of which 185 were in prison and 38 on bail. The second section contains the number committed for trial for “*offences against property done with violence*,” subdivided into ten species, amounting in all to 565. There were 1029 persons committed for offences against property “*without violence*,” subdivided into ten specified offences. A fourth section details “*malicious offences against property*,” divided into ten classes, but six of these columns are void. These six are the more serious of the class in which malice is shown by destruction, and from which Scotland has been free during the year 1881. The ten columns

only receive 28 offences of a *nominal* character, whilst 26 are ranked under "*other malicious offences*," which must have been of a very minor kind, the greater number being, as previously shown, disposed of in the Police Courts. A fifth section of this table details persons convicted for "*forgery and offences against the currency*," divided into nine species, but four of the columns provided for receiving the numbers remain void. The sixth and last section is designed for "*other offences not included in the above cases*." There are no fewer than seventeen columns prepared to record these "*other offences*," but nine of these remain untenanted! The sum-total of this table gives 2650 persons "*committed for trial*," of which 2153 were males and 497 females. The total number "*disposed of within the year*" was 2427, of which 2081 were "*called for trial*" and 346 "*not called for trial*." The tables proceed with "*disposal of persons committed*." The same classes of crimes are here again given with the same minute specification, and of course with similar empty columns. The grand totals record 1832 as being convicted, 10 as outlawed—no one found *insane and unfit for trial*, but 4 were acquitted on the ground of *insanity*. Of the 235 who were tried and acquitted, 63 had verdicts of *not guilty*, and 172 that of *not proven*. Three hundred and forty-six persons were "*not called for trial, being discharged*;" 251 it is stated as discharged "*at the instance of the Lord Advocate*," and 95 "*otherwise than at the instance of the Lord Advocate*." This last certainly requires some explanation. The tables we have abridged contain matter of great importance, well deserving the earnest study of those who desire the wellbeing of the community and the regularity of criminal procedure.

NESTOR.

(To be continued.)

THE VALUE OF CHILDREN.

WE are not going to consider the value of babies as alarum-clocks for arousing the male parent; nor as teachers of patience—the virtue, not the opera; nor as gainers of prizes at country fairs. Nor are we going to quote their market value south of Mason and Dixie's line in the days before the war; nor will we dilate upon the bounties offered by that paternal monarch, Louis XIV., for the production of children in New France, although he, in council, passed a decree, saying "that in future all the inhabitants of the country of Canada who shall have living children to the number of ten, born in lawful wedlock, . . . shall each be paid out of the money sent by his Majesty to the said country a pension of 300 livres a year, and those who have twelve children, a pension of 400 livres." Rich and poor were alike within the purview of this ordinance, whereas before Colbert's reward of 1200 livres for those

who had fifteen children, and 800 to those who had ten, was intended specially for the better class.

But we are about to refer to some of those cases where juries and judges have been called upon to estimate the sums that will compensate for injuries arising from the negligence of others to life or limb of infants, and the value of the services of which the parents of these injured innocents have been deprived by such hurts. This is a subject which must be replete with interest to every *pater familias* in humble circumstances, and how many a solicitor of the High Court of Justice is so situated!

First, let us look at the value of children piecemeal, or rather what persons injuring portions of their little human forms divine have had to pay for their negligences and ignorances. A boy seven years old was kicked by a horse, and had his eye, skull, and brain so badly hurt that the witnesses at the trial considered he would never be able to earn his own living; and they were right, for the poor little chap died nine days after the trial. The jury gave him £150 as a slight compensation; the owner of the horse not liking to pay that sum applied for a new trial, but the Court did not consider the damages excessive, and would not interfere (*Kramer v. Waymark*, L. R. 1 Ex. 241).

A child of two years was wandering about a railway track when it was struck by an iron horse, and was so injured that a leg and a hand were lost. The jury, when asked to assess the damages, gave \$1800 as a recompense (*Redfield on Railways*, vol. ii. p. 243, n.). Surely this little trot could not have brought more gain to its parents if it had been actually born with the legendary silver spoon in its mouth. This valuable child dwelt in Connecticut.

Out in Missouri a boy lost his hand through a defect in a moulding-machine, and upon suing the owner, who was also his employer, he recovered \$1000. The Court sustained the verdict (*McMillan v. Union Press-Buck Works*, 6 Mo. App. 434). Little Mangan, an English boy, had nothing like the same good fortune, although his misfortune was very similar. He was a small school-boy of four summers, and when passing homewards one day was induced, by a brother of the more mature age of seven, to put his fingers into a machine for crushing oilcake that was standing unguarded beside the road. Another mischievous little wretch turned the handle and round went the wheels; the chubby fingers were seized and badly crushed, so that three of them had to be amputated. The owner of the machine was sued for negligence in allowing it to stand so exposed, and at the trial the sight of the fingerless and maimed little hand could only induce the twelve honest-hearted jurors to give a verdict of £10 in favour of the boy. Even this pittance Mangan was not able to get, because the Court held that the defendant was not liable for the injury, as it was caused by the act of the plaintiff and the boy who turned the handle (*Mangan v. Atherton*, 4 H. & C. 388; L. R. 1 Ex. 239).

Another little boy in England, aged five years, was equally unfortunate. Being too young to take care of himself his granny went with him to Velvet Hall Station, to take the train to Berwick-upon-Tweed. After getting their tickets, on crossing a track they were struck by a freight train, the old lady was killed and the child severely injured. An action was brought for these injuries to the lad, and the jury awarded £20. The Court, however, set aside the verdict, as the jury had found that the grandmother had been guilty of negligence, without which the accident could not have happened; and the Court considered that the infant was so identified with the grandmother that the action could not be maintained, her carelessness being a sufficient answer to the claim (*Waite v. N. E. Ry.*, El. Bl. & El. 719).

In Mississippi a man had to pay \$100 for merely whipping a child of five, who had, however, assaulted in a violent and brutal manner (so saith the reporter) the whipper's only child, an infant of eighteen months (*Lowell v. M'Donald*, 58 Miss. 251). In Massachusetts a miss of thirteen winters recovered damages to the extent of \$5000 against a railway company for an injury done to an arm; and then when she was of age, her father sued the company for the loss occasioned by the self-same accident, of her services during minority, and he obtained \$500 to compensate himself wherewith (*Wilton v. Middlesex Ry.*, 125 Mass. 130). The gentler sex is highly prized in New England, judging by this and the Connecticut case. Boys, however, at least in the West, are deemed mere money-making machines. Old Miller's boy of nineteen lost his arm through the negligence of a railway company, and the father recovered \$2000 for the value of the son's services until he came of age, and for the expense of medical attendance and nursing in consequence of the injury (*Houston, etc., Railway v. Miller*, 49 Tex. 322).

And now let us consider some of the amounts that have had to be paid where the wrong has caused the death of the child. In such case the rule is that damages of a pecuniary nature must be shown; the damages are not to be given merely for the loss of a legal right, but should be calculated with reference to a reasonable expectation of a pecuniary benefit, as of right or otherwise, from the continuance of the life of the lost one (*Franklin v. S. E. Railway*, 3 H. and N. 211; *Walton v. S. E. Railway*, 4 C. B., N. S. 296). In fact, what is laid down by the decisions is, that there must have been a reasonable expectation of pecuniary advantage to the parent from the life of the deceased (Field, J., *Heatherington v. N. E. Railway*, L. R. 11 Q. B. D. 160). Still it was held, in a case where a healthy boy of six years old was killed, that absence of proof of any special money damage flowing from the death of the child will not justify a nonsuit, nor a direction on the part of the judge to the jury to find nominal damages only (*Gorham v. N. Y. C.*, 23 Hun. (N. Y.) 449). The "necessary injury" to a parent by the

negligent killing of a child, and for which he is to be compensated, comprises the loss of the service of the child during minority, the costs of nursing, medical attendance, and the funeral expenses (*Rain v. St. Louis, etc., Railway*, 71 Mo. 164). In England doubts have been suggested as to whether damages are obtainable to compensate for the loss of the services of a child so young as to be unable to earn anything (*Bramhill v. Lee*, 29 L. T. 11). But in the United States the doctrine has been well settled. In *Hill v. Forth Second Street Railway* (47 N. Y. 317), where a boy of three years and two months had been killed, and the jury had given a verdict for \$1000, the Court of Appeal sustained it, saying, "It was within the province of the jury, who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present and prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years, and to hold that without such proof the plaintiff could not recover, would in effect render the statute nugatory in most cases of this description. It cannot be said, as a matter of law, that there is a pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury." As Eliza Hooghkirk, a healthy and bright child of six, was being driven by her father on a waggon into Albany, the waggon was struck by a locomotive and substantially destroyed; all the inmates were injured, but the child was killed. The jury was particularly instructed that in estimating the damages they should be strictly confined to the pecuniary injuries resulting from such death to the next of kin of the deceased—that the pain and shock to the feelings of the parents, caused by the death of their daughter, could not in any way be considered, and that in fixing such damages they should be guided by what, in their honest judgment, they should deem a fair and just compensation for the pecuniary injuries resulting from such death, which compensation, however, could not, according to the statute, exceed \$5000. After this charge the jury awarded \$5000, and the Court was asked to set the verdict aside as excessive, but declined to interfere, saying, that as a matter of law it is impossible for any Court to say that the actual "pecuniary injuries" resulting from the death of the infant might not be \$5000. Possibly the probabilities are against it, but the statute in this region of conjecture has committed the formation of an opinion to a jury upon whose discretion the only limitation is the maximum which is thereby allowed. The discharge of such duty, expressly confided to a jury by statute, necessarily, in a case which presents reason-

able grounds of conjecture, involves a wide discretion, and unless the evidence shows a plain error, the verdict cannot be disturbed.

Hetty Downie, a girl of the age of about seven years, was run over by the cars of the New York and Harlam River Company, and killed. She lived with her mother. On the trial anon—suit was asked for on the ground, amongst others, "that there was no proof of any pecuniary or special damages sustained by the plaintiff or by the next of kin." The motion was overruled, and the plaintiff had a verdict of \$1300. The Court of Appeal said, It is not required, to sustain the action, that there should be proof of actual pecuniary loss. The damages are to be assessed by the jury with reference to the pecuniary injuries sustained by the next of kin in consequence of such death. This is not the actual present loss which the death produces, and which could be proven, but prospective losses also. They may compensate for "pecuniary injuries," present and prospective (*Oldfield v. N. Y. & H. R. Railway*, 14 N. Y. 310). In *McGovern v. N. Y. C. & H. R. R.* (67 N. Y. 417), the action being for the death of a boy eight years of age and the recovery, \$2500, the Court held that the jury could estimate the whole damages sustained by the father from the death, as well as those proceeding from the loss of services during minority as those after, and would not interfere.

On the other hand, in Arkansas the Court considered that \$4500 was an excessive sum for a railway company to pay to a mother for the loss of the services of a child five years old through the negligence of the company (*Little Rock, etc., Railway v. Barker*, 33 Ark. 350). In this case it was decided that no compensation was to be given by the dead infant's parent for the loss of the companionship of the child. In Indiana, in one case, a father made no claim for the loss of his child's future services, and gave no evidence to show his loss; so, although the jury gave him \$1800 therefor upon the death of his child, the Court considered it excessive (*Penn Railroad v. Lilly*, 73 Ind. 252). The amounts awarded in England have been by no means as great as in America. In one case where an action was brought by a father, who was a working mason, for injury resulting from the death of his son, a lad of fourteen, who had been earning four shillings a week, but at the time of his death was out of employment, the jury found a verdict with £20 damages. A motion was made to set it aside as excessive, but the Court held that the father was entitled to retain the amount (*Duckworth v. Johnston*, 4 H. & N. 653). We quite agree with Martin, B., when he says, "If damages are to be given, I think that £20 is not too much."—*Canada Law Journal*.

THE ASSUMED JURISDICTION OF ENGLISH COURTS OVER SCOTSMEN.

THE judgments pronounced in a case decided in the Queen's Bench Division of the High Court of Justice a fortnight ago, which will be found elsewhere in this number, deserve the special attention of readers who are interested in this subject, because the principles enunciated by the judges seem to point strongly to the necessity for the repeal of the vexatious rules of Court by virtue of which the High Court of Justice has assumed a jurisdiction over Scotsmen. In January last we reported the proceedings at a meeting of representatives of legal bodies from various parts of Scotland, which assembled in the Advocates' Library in Edinburgh on the invitation of the Faculty of Advocates, to complain of the increasing encroachments of the English Courts upon our native judicature; and we believe that since then a memorial dealing in detail with the hardships complained of, and accompanied by a list of cases illustrative of them, has been forwarded to both the Lord Advocate and Lord Rosebery, and presented by them to the Lord Chancellor and the rest of the English judges. Whether representations of this semi-private character afford the best means of obtaining the redress of Scottish grievances may well be doubted—as yet they have led to no result—and it may be that the more vigorous step of a representation to Parliament may yet be required before our people can have attention paid to their demands.

The matter has been now for some time before the public, and it is therefore now pretty generally known that the English judges, by virtue of the powers given them by the recent English Judicature Act of 1875 to pass rules of procedure for the regulation of the business of their Court, have greatly extended their own jurisdiction, and have for some years been in the habit of issuing against domiciled Scotsmen summonses to appear and answer an English pursuer in the High Court of Justice at London. Most Scotsmen are also aware that the rights and independence of the Scottish Courts were fully secured by the Treaty of Union, and that therefore the ordinary maxim of law, that a pursuer ought to follow his defender to the Courts of that defender's domicile, should in the general rule secure a domiciled Scotsman from annoyance of this sort. Our own judges have also by ancient constitutional law and usage the right to frame Acts of Sederunt, as they are called, for various purposes connected with their own administration of justice in Scotland; but it has not yet occurred to them to arrogate in this way to themselves a jurisdiction which in truth they do not possess, and which is at variance with so fundamental a rule of international law. The English judges had apparently no such powers, at least as against Scotsmen, before the English Judicature Act; and it is clear from the circumstances under which that Act was passed, and

the common-sense of the matter, that the power then conferred upon them was meant to be limited to matters and processes over which they had already control, and was not intended to override the constitutional law of the land. The details of the remodelling of the English system of judicature were of course beyond the scope, or at least the possibility, of Parliamentary discussion; and it was very properly provided in that statute that a committee of the judges should arrange these details and submit to Parliament rules for the regulation of the new High Court of Justice, which after lying for a certain time on the table of the House, should, if not objected to, become part of the Act and of the law of the land. But when these rules were submitted to the House, it was the last idea that could occur to a Scottish or Irish member that they could in any way affect him as a Scotsman or an Irishman, or subject him on any other than hitherto well-settled grounds to the jurisdiction of a foreign tribunal. And probably, therefore, of the few members who did look at the rules, not one was other than an English member.

Strange as it may seem, however, the English judges did so extend their jurisdiction, the result being that a litigant so summoned by them must either contest the question of jurisdiction in a preliminary litigation, or submit to have the merits of his case decided by what is really a foreign tribunal. When these consequences began to be felt, and Scotsmen and Irishmen began to complain, all they could get was a promise from the Lord Chancellor of the day that the English judges would reconsider their rules and amend them so as to be at least reasonable. The amendment that was then made, however, soon proved ineffectual, the nuisance remained practically unabated, and when, a couple of years after, the Irish Courts obtained, under their Judicature Act, pretty much the same powers, Scotsmen were in worse plight still. They suffered in grumbling silence till the thing could be tolerated no longer, and a few months ago the matter began to be publicly agitated. The Convention of Royal Burghs, the Chambers of Commerce, the Trade Protection Society, and the various societies of solicitors throughout the country one after the other met and formally protested against the injustice, and the memorial we have referred to was prepared, and a complete statement of the case was submitted to the Lord Advocate and Lord Rosebery. Since then it is understood to have been under the consideration of various officials, but nothing has yet been done, and the condition of business in the House has not yet afforded an opportunity to any of the Scottish members of proposing any measure.

Probably, as has been mooted, the reciprocal jurisdiction of the Courts of the three kingdoms is a matter that would be appropriately and most satisfactorily dealt with by a committee of lawyers from each country, but that is for future and more mature consideration. The important fact, however, that the hardship continues in the mean-

time unabated is abundantly proved by the case above referred to of *White v. McGregor & Son*, which illustrates, and that in a very striking manner, not only the nature of the evil, but the crying necessity for its immediate abolition. It appears that preserve manufacturers in Dumfries ordered some tons of gooseberries from a fruit merchant in Covent Garden Market in London. The goods were duly forwarded to Dumfries, and a dispute arose as to payment of the price, with the nature of which we are not here concerned, but which appears to have turned mainly, if not solely, upon the construction of the letters and telegrams constituting the order. The pursuer obtained, by virtue of the rules referred to, an order for service upon the defender outwith the jurisdiction of the Court of a summons for £47, 13s. 6d. The cases in which the English judges, by virtue of the rules they thus passed, claim a jurisdiction over Scotsmen may be here classified generally under four heads—those relating to property in England; those relating to contracts made in England; those relating to breaches in England of any contract wherever made; and those relating to acts done in England. This specification is comprehensive enough, and when we consider the favour with which English Courts generally regard their own litigants, and the universally acknowledged insular presumption which appears to affect the English mind against “foreigners” merely as such, the possibility of including under it almost every imaginable action between a Scotsman and an Englishman will be pretty apparent—and that, indeed, is partly the reason of the hardship and injustice of the rules. But the case further illustrates the futility of one, at least, of the checks imposed in 1876 to meet the complaints which it has been explained were then made. For though till then it had been sufficient, in order to obtain an order for service outwith the jurisdiction, to swear that the cause of action, or part of it, arose within it, it was then provided that an applicant should further make oath that it would be more convenient to try the case at London than in the place of the defender’s residence, and also that there was in that place no local court of limited jurisdiction competent to decide the matter. These applications being entirely *ex parte*, have been so often made upon false affidavits that one might almost say that that practice has been the rule hitherto, and the unfortunate defender invariably found that in order to contest the case he must first attack the validity of the order for service, and become thus at once involved in a preliminary litigation at London which had nothing to do with the merits of his case. He could not afford to let a decree in absence pass against him, for that was at once sent down to Scotland and enforced against him summarily under the provisions of the Judgments Extension Act of 1868, and no wonder therefore he often preferred to suffer injustice than go to law for his rights in a foreign country. But some defenders have been courageous enough to resent and resist such treatment, and it is

only right to say they have almost invariably been successful, though indeed it would have been surprising if, on the falsity of the affidavit being shown, the result had been otherwise. But all this costs money, and expenses of a lawsuit somehow are not so easily recovered in their entirety from a debtor in England; at least they somehow suffer considerable diminution in passing through the hands first of an English and then of a Scottish solicitor.

Now all this happened as a matter of course in the present case. The particular falsehood of the affidavit here was the somewhat astounding one that in Dumfries, the seat of a Sheriff Court, there was no court of limited jurisdiction competent to try this very ordinary action for recovery of a debt. Of course this was easily shown to be a weak invention of the enemy, and it was further shown that a case of this value could be tried in the Debts Recovery Court at Dumfries for something like £4 a side as against the costs of an action in the Supreme Court of England, so that no objection was or could be taken to the cheapness and convenience of the Scottish Court. Justices Field and Stephen were not slow to recall an order for service granted on statements like these. As Mr. Justice Stephen said, "If Mr. White wants his money, he ought to go to Dumfries to get it;" and even his English solicitor will probably join in the hope which the learned judge went on to express, that when Mr. White does go there "he will be more careful as to what he swears than he was when he swore that affidavit."

But the case presents certain novelties which must strike every lawyer. In the first place, the plea upon which Mr. Justice Day dismissed with costs the summons which the defenders had taken out to set aside the *ex parte* proceedings granting the order for service is somewhat startling. Not having an opportunity of objecting to the first granting of such an order, the only course for an objector is to take out a summons to have it set aside; and it was maintained here for the pursuer, and actually affirmed by the judge, that by so doing, *i.e.* by appearing for the purpose of objecting, the defenders had waived their right to object! It is trite law with us in Scotland, and it seems common-sense, that by appearing, to defend an action, you do not bar yourself from any competent plea. But in England if you come into Court at all, you seem to be once and for ever subject to the jurisdiction of the Court. How on such a principle it can be possible ever to state a plea to the jurisdiction or competency of any tribunal, only the subtleties of English law can explain. But if this be the case, it would appear that Scotsmen are acting with only their proverbial prudence when they prefer their own law to the English. Of course the Justices, Field and Stephen, to whom this decision was appealed, promptly reversed it, and the defender gained his case. But the fact remains that he has had all this trouble and expense of a litigation in the Supreme Court of England simply because the English

judges passed certain very unjust rules which gave an unscrupulous countryman of theirs the right to tell certain lies against him.

But although success in the Court of Appeal was of course the immediate object of the litigant in question, the grounds of his success are of still greater importance to his countrymen, and so indirectly to himself also. As has been explained, the order for service was set aside because it should not have been granted in the circumstances, and presumably never would have been granted at all if these circumstances had been fairly put before the Court by the original applicant. He swore, and obtained his order because he swore, as required by rule 1a of Order XI. of Court, that there was no "local court of limited jurisdiction" in the place of the defender's residence. The appellant proved this to be a falsehood by referring to the Act of Parliament, which establishes what are well known in every sheriffdom in Scotland as the Debts Recovery Courts. The justices did not require to decide the express meaning of the term "local court of limited jurisdiction." To do so might not perhaps be very easy. They found such a court, created by special Act of Parliament in 1867, and competent to the decision of a claim of the nature and amount here sued for. So far so good. But are the Debts Recovery Courts our only safeguard against the High Court of Justice in England in any dispute we may have with an Englishman? They are certainly local courts, and they are assuredly limited in jurisdiction in the important respect of the sums for which they may give decree. But does it really follow, as it would seem to do from the ratio of this decision, that whenever a sum below £12 and above £50 is claimed from us by an Englishman we must of necessity meet our creditor in his Courts rather than in our own? The Sheriff Court is, it seems, too good for us. It is a local court; it is a cheap court; it is a carefully regulated court, with in most cases an experienced judge presiding in it; and its mistakes, when they occur, can be corrected by our Supreme Court in Edinburgh at little expense. But, say the English judges, it is not a court of limited jurisdiction, and therefore we have, under the rules which we have passed for our own guidance, a discretion to bring you away from it into our Supreme Court in London, where this honest subject of the Queen resides who has a claim against you; your witnesses may be all in the town where you reside, but his are all here, and therefore you must come; you may require no witnesses, but in that case we can the more easily decide your case for you, and you will be able to go direct by way of appeal to the House of Lords, through our Divisional Courts and our own Court of Appeal, and therefore you must come; you will, it is true, have to run the gantlet of an additional court on your way, but that is an English court, and therefore you must come; you will have the benefit of English law, which you don't understand, and which is different from your own, and in many respects not so good, and

therefore you must come; and if you don't we will pass a decree against you in absence, which this honest Englishman will send down to Edinburgh and have recorded in the Register of English Decrees kept in your excellent Register House there, and you will find that your own judges there will not be able to suspend the execution of that decree, but will say (for they are honourable men, like this Englishman) that the Judgments Extension Act, which is an Imperial statute, obliges them to give effect to a duly-recorded English or Irish decree, and that you should have come here at first and defended yourself if you meant to do so.

All this and more is implied in the grounds upon which the Divisional Court set aside the order for service in the case now referred to. But although the decision is disappointing to Scotsmen, inasmuch as it rests their exemption from the rule of Court in question, entirely upon the existence in Scotland of a local court, whose jurisdiction is expressly limited by the Act of Parliament creating it, and by inference therefore denies the right of any Scotsman to plead the existence of the ordinary Sheriff Court and of the Court of Session in Edinburgh as a reason why he should not be summoned to London simply because his creditor is an Englishman, it is yet valuable not only as showing the appreciation which the English judges still have of the value of truth in an affidavit, but also in respect of their explicit recognition of the old and safe rule of international jurisdiction, that a pursuer must sue in the defender's domicile. It is not probable that many of his brethren will hold themselves bound by Mr. Justice Stephen's expression of the law, and the decision here, after all, goes no farther than to correct the misstatement of fact upon which the former judgment proceeded. So long as a plaintiff has the right to make such an application to a judge in chambers as may entail upon a foreigner outwith the jurisdiction of that judge, the necessity and expense of defending himself in the plaintiff's country against his claims, no general assent to the received doctrines of international law and the obvious expediency of following them, will mend matters. "When a man lives in a particular place, if you choose to trust him, you must go to that particular place to sue him if you want to get justice against him because he has broken his contract. The plaintiff is to follow the defendant, and the defendant is not to follow the plaintiff," says Mr. Justice Stephen. It is obvious good sense and sound law in every country but England. But a case occurred not long ago in which one of Mr. Justice Stephen's brethren decided precisely the opposite—a fact of which he is perhaps as unaware of, and probably as indifferent to, as the rest of his brethren have been to the brave words of his we have quoted. If Mr. Justice Stephen's principle is correct, and we submit it is, the necessary result must be that an order which permits such practices should be repealed. It is impossible here to discuss the history of the order, or to consider the justice or injustice of the ancient claims to

jurisdiction over foreigners, of the English Courts, which no doubt led to its passing. It is enough here for us to find the principle of it repudiated by an able English judge, and to have pointed out the opportunity which the pernicious English system of affidavits affords of its being flagrantly misused. No harm would be done but for the Judgments Extension Act, which renders the decrees of the Courts of the three kingdoms mutually and summarily enforceable. The English judges might exercise their discretion, at discretion, or without it, as they pleased, and they might give what judgment they chose against people who were not subject to their jurisdiction, if our own Courts had not afforded their judgments the privileges of native decrees. That was done in reliance that English judgments would proceed on rules of well-established international law, just as France might agree to recognise and enforce a decree of a British Court. But would France allow her subjects to be summoned to England and judged by English instead of French law? Would any foreign State submit to such interference? The English judges are too careful to run that risk, as was shown so long ago as 1876, when one of them remarked, "Service of process upon a foreigner not a subject of her Majesty in another country may involve unpleasant questions of jurisdiction," and proceeded to advise that only notice of proceedings, and not the actual writ itself, should be served upon the defendant. A Scotsman is, however, in English law a foreigner who is a subject of her Majesty, and therefore bound by the laws of the United Kingdom, one of which (the Judgments Extension Act of 1868) unfortunately allows English decrees in absence to be enforced against him summarily by registration in Scotland, so that as regards him no "unpleasant questions of jurisdiction" can arise, he being helpless to resist what becomes in fact a recorded decree of his own Courts.

One word as to the extent of the grievance. It will be remembered that in March last, soon after public attention had been called to the encroachment, Mr. Dick Peddie moved for a return to the House of the number of writs issued by the High Court of Justice in London, and allowed to be served in Scotland since 1st March 1877. The object of the return apparently was to afford some statistical information as regards the actual practice under the rules; and accordingly it was designed to mention in each case the number of defenders resident in Scotland and England respectively, the nature and amount of the claim made, the time allowed to enter appearance, and the sum required to be paid in name of costs to stay proceedings. Of course, even this scheme of return is very defective, regarded as an attempt to illustrate the grounds, if there be any, on which the English Courts could, apart from their judges' rules, lawfully exercise any jurisdiction against Scotsmen; and the return itself is still more defective than its scheme. But upon examination it will be found amply to bear

out, so far as it can be expected to do so, the justice of the demand now made by Scotsmen for a repeal of the rules.

It appears, then, that between 1st March 1877 and 1st March 1880 there have been at least 418 writs issued in which service has by leave or order of the Court been made upon Scotsmen; and the return further discloses that, with the exception of six, the defenders in each of these cases were all resident in Scotland. The inference therefore lawfully deducible is, that at the rate of 100 actions (including possibly a much greater number of individual defenders) in each year, Scotsmen are being subjected to a foreign jurisdiction in defiance of constitutional law and privilege. That, however, was the case two years ago. Complaints of the hardship of being dragged *volens volens* to London are now being made with daily increasing frequency, and it is not to be for one moment suspected that with the increase of business and intercourse between Scotsmen and Englishmen the practice has since then suffered any diminution, but rather the reverse. So much for the dimensions of the nuisance.

Of the 418 cases enumerated, however, no less than 287 are merely an approximate or estimated number. It seems that in the Chancery and Exchequer Divisions of the Court no separate list of writs served in Scotland has been kept during the first three years comprised in the return, and that since 1st March 1880, when the offices of all four divisions of the Court were amalgamated, no separate account of these writs has been kept. How the "approximate number," therefore, has been arrived at with any satisfactory degree of accuracy one is at a loss to understand. A note appended to the return informs us this has been done by examining so many months and striking an average for the year of the Scottish writs discovered in each; but though that may be the best or only attainable mode of completing the return, it can hardly be acknowledged to be entirely satisfactory.

However, to pass from that objection, the fact remains that only in 131 cases have we any of the details promised and intended to be disclosed by the writ. But if they are to be taken on the "average" system as fair specimens of the character of the remaining two-thirds of the whole number, they aid very considerably those who complain of the rule. To begin with, in the column of the return which mentions the nature of claim or action, we find, as might have been expected, every imaginable cause of dispute—sales of all kinds, fees for various kinds of professional work, claims for money due on bills, guarantees, loans, promissory notes, and insurance contracts, and actions of damages of various descriptions, including breach of contract and personal injuries. One action is specified to have been brought to recover the price and keep of a bloodhound—can this have been Morgan on his way to Dunecht? In fact, this column discloses the fact that the objectionable rules operate in transferring to the English Courts the defence of an

unfortunate Scotsman to all and every action—the most ordinary as well as the most unusual—that may happen to arise between himself and an Englishman.

The column which contains the amounts sued for is not less instructive. There we find that many of the actions were for sums too low to be sued for in the Court of Session; so that by threatening his debtor with an action in the Supreme Court of England the English creditor may obtain a decree in absence and secure payment without the necessity of proving his case. One action was for £7, 14s. only, and the debtor was at the same time required to deposit £2, 18s. of “costs to stay proceedings” before he could be permitted to defend it even in England. Nearly 75 per cent. of the cases are for sums under £100, and it can surely not be pretended that in all these cases the cost and convenience of the parties was in favour of a trial in the pursuer’s as opposed to the defender’s domicile. No more effective weapon for unjust coercion was ever placed in a creditor’s hands than these rules seem to be as disclosed by this return. And it only remains to be added that to the injury thus inflicted upon the Scottish defender, has been added the insult of requiring him in every case to deposit what are called “costs to stay proceedings,” before allowing him to defend himself even in the foreign Court. Enough is certainly disclosed by the return, defective as it is, to justify a strenuous effort to abolish the nuisance it reveals.

Review.

Principles of the Law of Insurance adopted in the Civil Code of the State of California, with Notes and References to Adjudged Cases. By WILLIAM BARBER. San Francisco: Sumner, Whitney, & Co. 1882.

IN 1865 a Commission which had been appointed by the Legislature of the State of New York to prepare a Civil Code for that state completed and published a draft of a Civil Code. This Code has not yet been adopted by the State of New York, but the labours of the Commission have been appropriated by California, which adopted in 1872 a Civil Code based, and to a great extent copied, from the proposed Code of New York.

In this book are to be found the clauses in the Civil Code of California applicable to insurance, to which Mr. Barber has appended a series of illustrative notes, founded upon the common law as laid down in the numerous Courts of the United States. In this country we used to look with compassion on the English lawyer, who was condemned to grope his way amid the wilderness of single

instances; but the growth of our own reports, and the necessity, in large branches of the law, of constant reference to English law, make a Scottish lawyer of the present day regret the time when no yearly volumes of reports burdened the shelves of the most learned of the Faculty. But when we turn over the leaves of Mr. Barber's book, we feel that there can be no class of men so much to be pitied as American lawyers, who must draw their arguments from the reported cases in the English Courts, in addition to the reports of cases in the Courts of each state of the Union, as well as in the Supreme Court at Washington. To a Scottish lawyer reference to these decisions is almost impossible, because he cannot tell what degree of authority is to be attributed to the opinions of the different judges. A code such as that of California, extending to 168 sections, requires a great deal of explanation to make it intelligible; and though we cannot profess to say whether Mr. Barber has selected the most appropriate cases in support of his comments, these comments seem likely to be useful in directing attention to the points of each section, and in showing how the principles of the common law, which are now embodied in the Californian Code, are to be applied. Such illustrations are apt sometimes to mislead. The intentional or accidental omission of a single phrase may so alter the principle of law as to render all reference to former decisions only misleading, but even where a change of the law has been made, it is only by putting side by side the law as it formerly was, and the principle in the Code, that the full effect of the change can be understood. Mr. Barber's book is got up in a neat, handy form, and will no doubt be carried in the pocket of many an American insurer who is anxious to have always at hand a *vade mecum* in which he may find his obligations and his rights defined. In this country, lawyers will find it of use in suggesting points which have not occurred either in Scottish or English practice, but it will not be safe to rely on propositions based solely on the decisions of American Courts, which show generally a leaning towards the assured, and more readily assume bad faith on the part of insurance companies than Courts of law on this side of the Atlantic do.

The Month.

Service of English Writs in Scotland.—The following is the judgment in the case of *White v. McGregor & Son* referred to in the article in the preceding pages of this number:—

Mr. Justice Field said: I think that this appeal must be allowed. The case arises in this way: The plaintiff has a cause of action, as he says (he may have one, I do not know whether he has or not), against the defendants for goods sold and delivered to the defendants, who carry on their

business in Scotland, out of the jurisdiction of this Court ; and the plaintiff has applied, as he has every right to do, to a learned judge at Chambers *ex parte* for a writ alleging that part of the cause of action arose and was entered into within the jurisdiction, or that there has been a breach of it within the jurisdiction. That part of the matter we are not called upon in any way to decide, because that is not the point before us. But in asking the learned judge for leave to serve the writ in Scotland, the plaintiff is placed in a different position to what he is in when he asks for leave elsewhere than in Scotland or Ireland, because there have been ever since the Judicature Act passed great objections on the part of Scottish lawyers and other people to being compelled to come to London to have their causes tried. They say, "We deal with English people ; we live here in Scotland, and they are willing to trust us, and if we want credit they make their contracts with us ; we have a civilized system of judicature here ; we like it very much ; you may not like it so well as we do, but we think it wholesome, and the Legislature has so far attorned to that feeling that they have altered the rule which formerly stood and made a specific rule with regard to Scotland and Ireland, and that rule imposes on the plaintiff a further matter that he will be required to deal with." I refer to rule 1a, and the words are important ; because after saying generally the judge in exercising his discretion shall have regard to the amount or value of the property in dispute or sought to be recovered, it says that he is to have regard "to the existence in the place of residence of the defendant, being resident in Scotland or Ireland, of a local Court of limited jurisdiction having jurisdiction in the matters in question ;" and also to have regard "to the comparative cost and convenience of proceeding in England, or in the place of such defendant's residence, and in all the above-mentioned cases no such leave is to be granted without an affidavit stating the particulars necessary for enabling the judge to exercise his discretion in manner aforesaid." That being the state of things, it is the duty of every plaintiff who applies for an order to take care and ascertain whether or not there is a Court of competent jurisdiction having jurisdiction over the matter in question. I have refused many orders on the ground that the affidavit did not disclose anything of the kind. In the present case the plaintiff has taken upon himself, or somebody for him, to say : "I, the above-named William Nicholas White, of Covent Garden Market, in the county of Middlesex, fruit and potato salesman, make oath and say as follows : This action is intended to be brought to recover from the defendants the sum of £47, 13s. 6d. for goods supplied by me to the defendants. I am advised, and I verily believe, that I have a good cause of action against the said defendants in respect of my claim indorsed on the said writ. The said defendants became indebted to me as follows : They bought of me at Covent Garden Market aforesaid, within the jurisdiction of this honourable Court, the gooseberries above referred to, and they were consigned to them by rail, and in due course delivered to them. I have applied to them for payment of the amount due, but they have refused to pay. The said defendants reside and carry on business at Dumfries, in the county of Dumfries in Scotland, and may be found there out of the jurisdiction of this Court, and are British subjects. There does not exist in the place of residence of the said defendants any local Court of limited jurisdiction in respect of the matters in question in this action."

I have caused many cases to be adjourned in order to get the information, and I have caused diligent inquiry to be made whether there does exist this kind of Court. In this case the plaintiff says there is not one. I do not impute any fraud to him, but I say he did this without any inquiry whatever, because if he had made inquiry he would have found it out. He takes it boldly upon himself to assert that there is no Court of limited jurisdiction in Dumfries to try this cause. This is another instance of the practice I very much complain of; that is, the practice of dealing with *ex parte* applications; and I hold, and I have held it over and over again, and will continue so to do until I retire—if ever that should happen—that parties who make *ex parte* applications are bound to bring before the Judge all the materials they have at their command. They are not boldly to make statements which, if they had made inquiry, they would have found not to be true. If they had made inquiry, they would have found there was a Court perfectly competent to deal with this; and if they had done that, and stated all the elements to the learned judge upon the *ex parte* application, and had said, "I think that is not a Court fit to try this case," that would have been one thing, and the learned judge would have made his order upon it. The plaintiff did nothing of the sort. He states that which is really untrue. Although the defendant's affidavit has been put in, the plaintiff does not produce any affidavit in reply; he does not say there is anything to show it is more desirable to have the case tried in London than in Dumfries. I therefore decide it upon this ground—that the materials brought before the learned judge at Chambers were most uncandid. I do not use any harsher term, but untrue facts were stated to him. Under these circumstances, I think this service should be set aside. There is another point which seems to me to proceed entirely upon a misunderstanding of the matter. It is said that because the defendant has appeared, it is not open to him to take this objection. It is said that the reason why it is not open to him to take the objection is, that he having attorned to the jurisdiction of the Court cannot say now that the Court has not jurisdiction. That may be a perfectly true proposition for aught I know. It may be that a man having once submitted to the jurisdiction of the Court, cannot afterwards be heard to say it has not jurisdiction. But this is not the question, as Baron Bramwell points out. It is not a question of jurisdiction—it is a question whether the subject is to have a proper remedy and particular relief. The defendant says, "I ought to be allowed to try it in my own domicile in Scotland." I think, upon the merits, I should have held that Scotland was the proper place. There is no question about the delivery of the goods here; no particulars, in fact, are given whatever to show that it would be more convenient to buy it in London than in Dumfries, and the defendant says there is no comparative convenience at all; because, after all, it is only a question of the construction of some telegrams and letters which the Court is quite as able, and much more cheaply, to dispose of in Dumfries than here. I think the motion must be granted.

Mr. Justice Stephen: I am of the same opinion. It has been said that it would be monstrous to hold that a man, by making an oath of this kind, may mislead the Court; and that after he has entirely misled the Court by making that oath, and having caused a person for his own safety to appear, can then say, "Oh, now that you have appeared, your

mouth is shut, and you cannot point out the fact that I have misled the Court." Mr. Dunham was very naturally anxious to have it understood that there had been no intention to deceive, and nothing discreditable on his part. I can only say that if I used any expression which could be taken to reflect upon Mr. Dunham personally, in any degree whatever, or upon those who instruct Mr. Dunham, I publicly beg his pardon; for I had no intention to do anything of the sort, or even in the slightest degree to say anything which could be personally offensive to him. But with regard to his client William Nicholas White, I cannot help saying that he did swear most rashly and most incorrectly. He is a fruit and potato salesman in Covent Garden, in the county of Middlesex, and I suppose knows absolutely nothing about law or about Courts of justice; but he has the audacity, or at any rate the carelessness or culpable rashness, to go before a judge, and to swear before that judge, in diametrical opposition to the fact, that there does not exist in the place of residence of the defendants, that is, Dumfries, any local Court of limited jurisdiction in respect of the matters in question in this action. I wonder what the fruiterer and potato salesman would say if one asked him what he meant by a Court of limited jurisdiction. I do not think he would have the faintest notion. He swears there is no such Court, when there is a Court specially appointed by Act of Parliament. I express my opinion that whoever drew that affidavit and allowed that man to make that false and rash oath acted with very great impropriety. If the matter had been submitted to me, and I had noticed that at Chambers, I should certainly never have granted leave upon that affidavit. Now, as to the merits of the case there is really nothing to be said. It is a general principle of law which applies to all proceedings so far as I know, and certainly to more countries than one, and it is commonly said to apply to all countries that the choice of a Court which is to try a case depends upon the residence of the defendant. That is obvious good sense. Where a man lives in a particular place, if you choose to trust him, you must go to that particular place to sue him if you want to get justice against him, because he has broken his contract. The plaintiff is to follow the defendant, and the defendant is not to follow the plaintiff. It would be, for obvious reasons, of the greatest possible hardship if that were not so. Generally speaking, the defendant living at Dumfries, the proper place to sue him is at Dumfries. Although there may be circumstances which would make it right to allow the plaintiff to sue in London, why should he not go to Dumfries? There is a local Court there. It is the ordinary case of sale of goods and the construction of certain telegrams. It seems to me that if Mr. White wants his money he ought to go to Dumfries to get it. When he goes there I hope he will be a little more careful as to what he swears than he was when he swore that affidavit.

The Scottish Law Magazine and Sheriff Court Reporter.

SHERIFF COURT OF BANFFSHIRE.

Sheriff SCOTT MONCRIEFF.

A. AND B. v. C. AND D.—November 14, 1882.

Law agent—Parties liable in payment of.—A contract for the execution of certain operations upon a bridge was prepared by the agents for a body of road trustees. *Held*, in the absence of proof of joint employment, that the contractors who had carried out the work were not liable in an action at the instance of the agents for one-half of the account due to them in connection with the preparation of the contract. The circumstances of this case, which arose in the Small Debt Court, are stated in the judgment pronounced by the Sheriff-Substitute:—

“In this action the agents of the Banffshire Road Trustees sue parties who contracted with their principals to execute certain work upon the bridge of Banff. They seek to recover one-half of the expenses ‘incurred in connection with the preparation, revision, and engrossment’ of a written contract for this work. It is not said on behalf of the pursuers that they were employed by the defenders. The latter had their own agent, who appears to have revised the contract after it was executed. It is, however, argued that because one-half of the expenses entailed in preparing it falls to be paid by the contractors, the pursuers are entitled in their own name to recover it, charging their clients with the other half. I do not think that this contention is sound or in accordance with the practice of the profession. Mr. Henderson Begg, in his valuable work upon *Law Agents* (p. 145), remarks, ‘In conveyancing and general business there are certain well-established professional rules as to the proportion of the whole expenses of a transaction which must be borne by each of the contracting parties. But such rules merely regulate the liability of the parties *inter se*; each agent has a direct claim only against his own employer, whom he may sue for the amount of his charges, leaving the parties to operate their own relief.’ This statement of the law is supported by the English authorities, and although there be no Scottish cases exactly bearing upon the subject, it has been decided in *Wallace v. Murdoch and Others* (June 25, 1828, 6 Shaw, 1018) that the fact of being benefited by the work done does not render a person liable to the law agent who has done it but who cannot plead employment.

“The pursuers here are the agents of the Road Trustees and not of the defenders. Let them proceed, therefore, against their own clients and leave the final adjustment of the mutual liability to them.”

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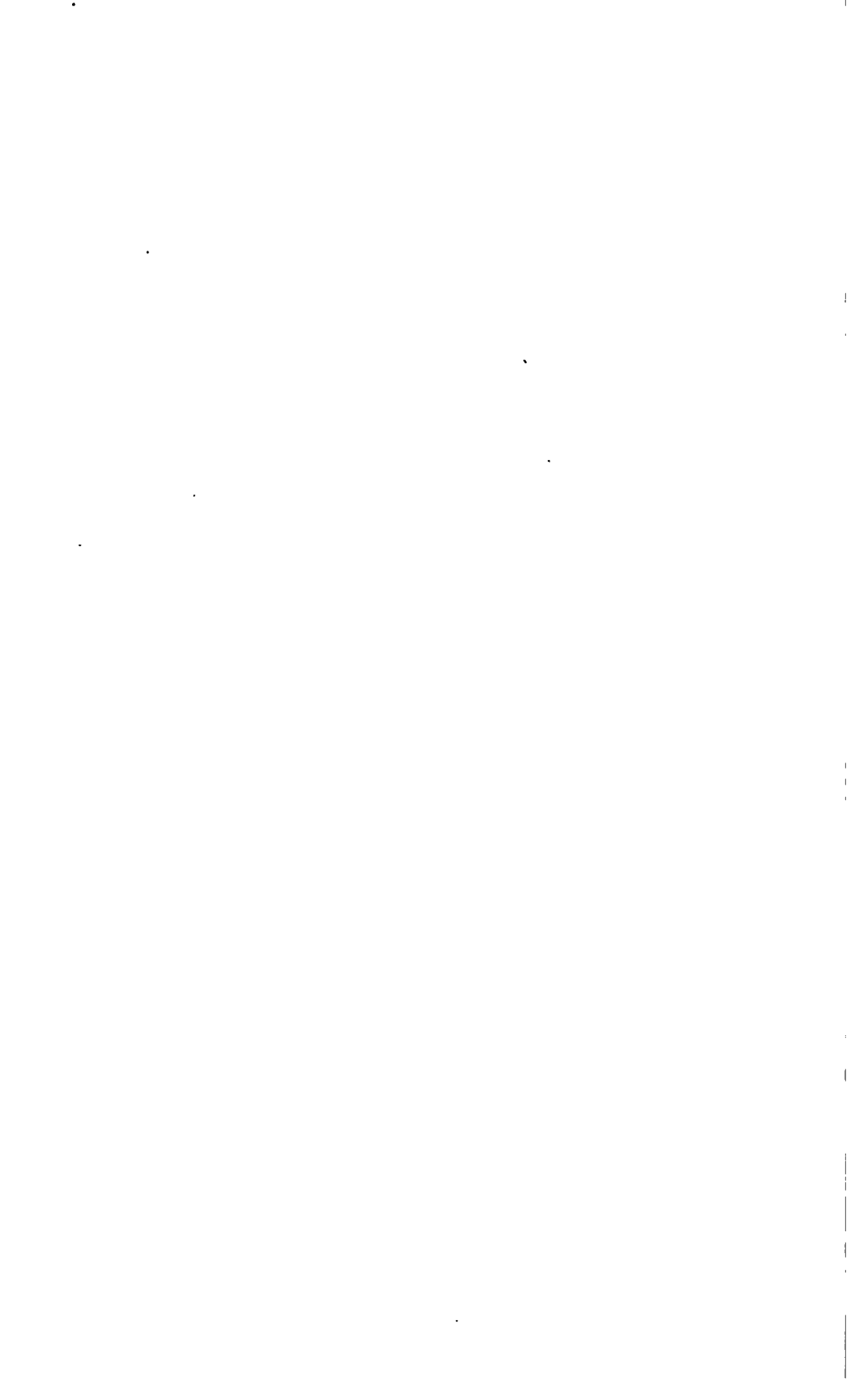
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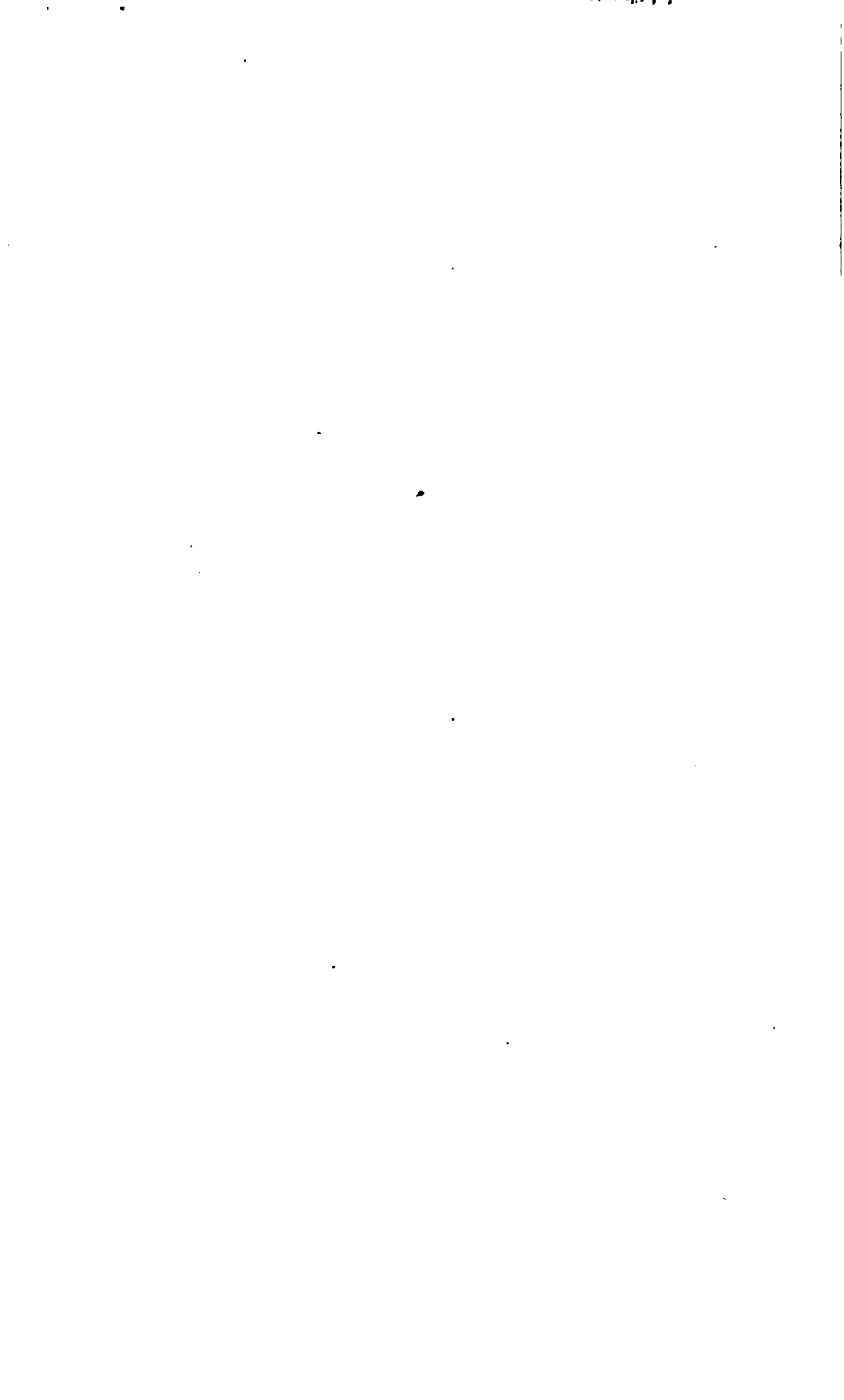
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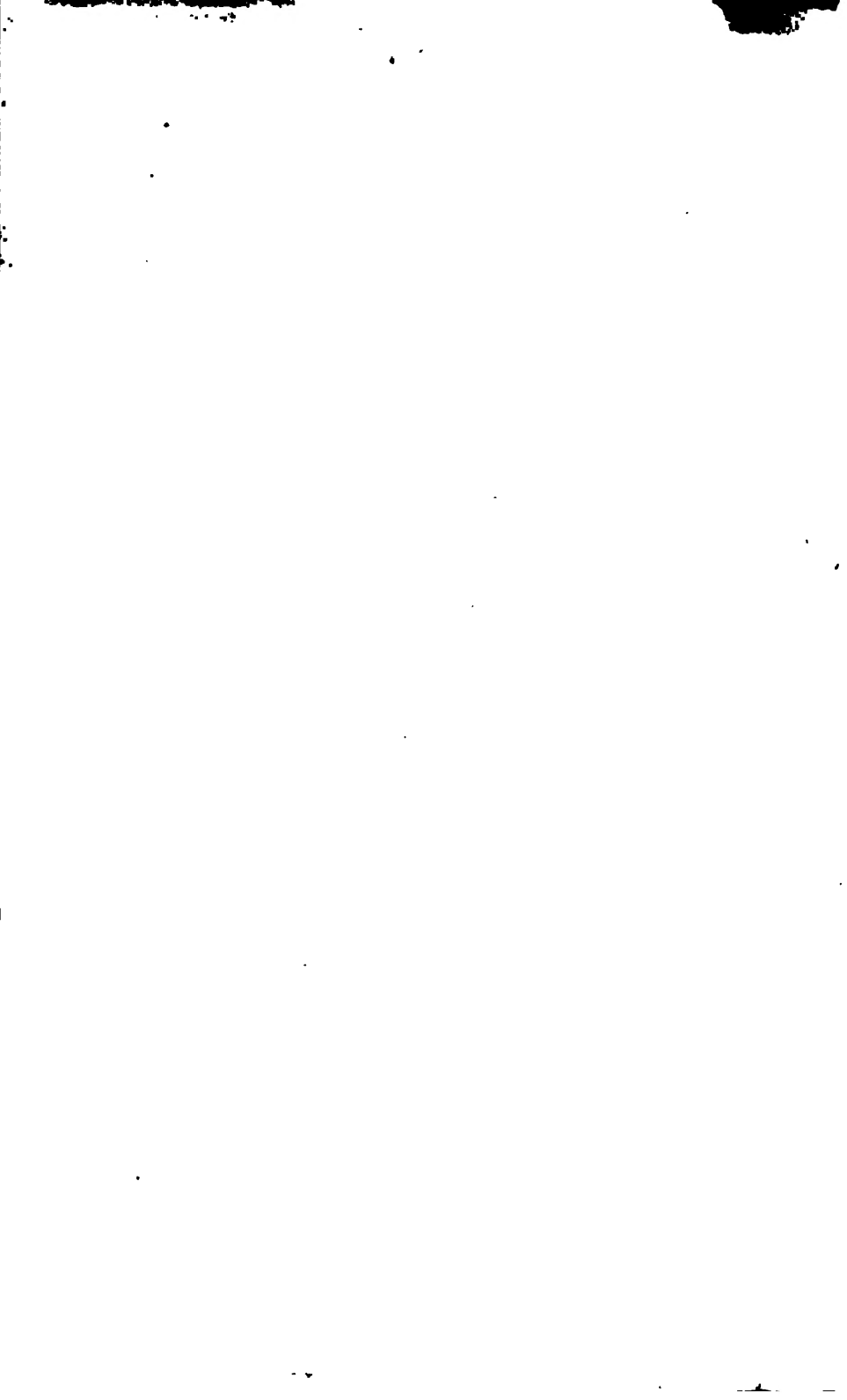












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